FILED

(1)

96 888 NOV 29 1996

No. 96 -

OFFICE OF THE CLERK

IN THE
**SUPREME COURT of the UNITED STATES**
OCTOBER TERM, 1996

---

ROCKY MOUNTAIN CONFERENCE OF THE
UNITED METHODIST CHURCH,
A COLORADO NON-PROFIT CORPORATION,
*Petitioner,*

*v.*

DIANNE R. WINKLER,
*Respondent.*

---

**Petition for a Writ of Certiorari to the Supreme Court of Colorado**

---

# PETITION FOR A WRIT OF CERTIORARI

---

NEIL QUIGLEY
QUIGLEY & BRUCE
950 South Cherry Street, #1010
Denver, Colorado 80222
(303) 691-6030

---

8 pp

## QUESTIONS PRESENTED

1. Is a church when hiring, supervising, disciplining and discharging clergy inextricable involved in religious activity protected by the First Amendment of the United States Constitution or is the Church exposed to tort claims while doing so?

2. Where no compelling interest is identified to justify the burden on a religious organizations practice of religion may tort claims be allowed?

## PARTIES

The parties to this action are Petitioner, **Rocky Mountain Conference of the United Methodist Church**, a Colorado non-profit corporation, and Respondent, **Dianne R. Winkler.** Glenn Chambers, retired clergy member of the Rocky Mountain Conference of the United Methodist Church, was a party in the underlying action but is not a party in this petition brought by Rocky Mountain Conference of the United Methodist Church.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS DELIVERED BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISION INVOLVED | 1 |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR GRANTING THE WRIT | 9 |
| I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULE OF FIRST AMENDMENT PROTECTION AGAINST INTERFERENCE WITH A CHURCH IN ITS ACTIONS INVOLVING CLERGY | 9 |
| II. THE COLORADO STATE COURT HAS IDENTIFIED NO COMPELLING INTEREST TO JUSTIFY THE SUBSTANTIAL BURDEN ON THE ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH RELIGIOUS ACTIVITY BY PERMITTING DIRECT TORT CLAIMS | 14 |
| III. A DECISION OF THIS COURT IS NECESSARY IN ORDER TO HAVE COLORADO FOLLOW THIS COURT'S PRIOR RULING AS OTHER COURTS HAVE DONE | 24 |
| CONCLUSION | 28 |

## TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| **CASES** | |
| *Bladen v. First Presbyterian Church,* 857 P.2d 789 (Okla. 1993) | 27 |
| *Bohrer v. DeHart,* *P.2d* , (Colo. App. 1996) | 14 |
| *Bowen v. Roy,* 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) | 17 |
| *Byrd v. Faber,* 565 N.E.2d 584 (Ohio 1991) | 27, 28 |
| *Cantwell v. Connecticut,* 310 U.S. 296 (1940) | 15 |
| *Church of the Lukumi Babalu Aye. Inc. v. City of Hialeah,* U.S. , 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) | 15, 17, 18, 23, 24 |
| *Connes v. Molalla Transp., System, Inc.,* 831 P.2d 1316 (Colo. 1992) | 12 |
| *Crystal Homes v. Radetsky,* 895 P.2d 1179 (Colo. App. 1995) | 22 |
| *Dausch v. Ryske,* 52 F.3d 1425 (7th Cir. 1994), aff'd in part and rev'd in part, 1993 WL 34873 (N.D. Ill. 1993) | 26, 27 |
| *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988) | 12, 13, 18, 19, 20, 21, 24, 27 |
| *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) | 16, 17, 18, 23 |
| *Gillette v. United States,* 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) | 17 |
| *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1 (1929) | 10 |
| *Isely v. Capuchin Province,* 880 F.Supp. 1138 (E.D. Mich. 1995) | 26 |
| *Jones by Jones v. Trane,* 591 N.Y.S.2d 927 (Sup. 1992) | 28 |

| | PAGE |
|---|---|
| *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952) | 10, 11 |
| *Kresshik v. St. Nicholas Cathedral of the Russian Orthodox Church*, 363 U.S. 190 (1960) | 10 |
| *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) | 15 |
| *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) | 17 |
| *Minnesota v. Herschberger*, 462 N.W.2d 393 (Minn. 1990) | 17 |
| *Mirick v. McClellan*, 1993 W.L. 156303 (Ohio App. 1 Dist. 1994) | 27, 28 |
| *Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993) | 12, 13, 19, 20, 22, 24 |
| *Nally v. Grace Community Church of the Valley*, 253 Cal. Rptr. 97, 763 P.2d 948 (Cal. 1988) | 26 |
| *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) | 10, 11 |
| *Pritzloff v. Archdiocese of Milwaukee*, 533 N.W.2d 780 (Wis. 1995) | 25 |
| *Roman Catholic Bishop v. Superior Ct.*, 50 Cal. Rptr. 2d 399 (Cal. App. 4 Dist. 1996) | 25 |
| *Roppolo v. Moore*, 644 S.2d 206 (La. App. 4th Cir. 1994) (cert. denied 650 S.2d 253) | 26 |
| *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755 (1988), cert. den. (1989) | 19 |
| *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907 (Neb. 1993) | 27 |
| *Schmidt v. Bishop*, 779 F.Supp. 321 (S.D.D.N.Y. 1991) | 26, 27 |

PAGE

*Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696 ..... 10, 11, 26

*Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) ..... 14

*Thomas v. Review Board,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) ..... 15

*United States v. Philadelphia Yearly Meeting of the Religious Soc. of Friends,* 753 F.Supp. 1300 (E.D. Pa. 1990) ..... 17

*Van Osdol v. Vogt,* 908 P.2d 1122 (Colo. 1996) ..... 11, 12, 15

*Watson v. Jones,* 80 U.S. (13 Wall.) 679 (1871) ..... 10

*Winkler vs. Chambers,* P.2d. (Colo. App. 1995) ..... 1

*Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ..... 14, 15, 18

*Young v. Northern Ill. Conference of the United Methodist Church,* 818 F.Supp. 1206 (N.D. Ill. 1993), 21 F.3d 184 (7th Cir. 1994) ..... 26

*Zick v. Krob,* 872 P.2d 1290 (Colo. App. 1993) 19

**OTHER**

*Employment Division v. Smith: A Great Step Backwards in Free Exercise Jurisprudence,* 1991 B.Y.U.L. Rev. 1331 (1991) ..... 17

*Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote,* 43 Baylor L. Rev. 577 (Winter 1991) ..... 17

First Amendment of the United States Constitution ..... 1

Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb ..... 14, 17

| | PAGE |
|---|---|
| Restatement (Second) of Agency § 213 cmt. d (1958) | 12 |
| *The Lender and Unconventional Fiduciary,* 23 Seton Hall L. Rev. 21 (1991) | 19 |
| 28 U.S.C. § 125(3) | 1 |

## OPINIONS DELIVERED BELOW

The opinion from which the Rocky Mountain Conference of the United Methodist Church files this Petition for Writ of Certiorari to the United States Supreme Court is issued by the Colorado Court of Appeals at *Winkler vs. Chambers,* P.2d. (Colo. App. 1995). The Colorado Supreme Court denied a petition for writ of certiorari on September 3, 1996. The text of the opinion and the denial order are attached in Appendices A at pgs. 1a to 20a and B at pgs. 21a to 22a, respectfully.

## JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. §125(3). The Colorado Supreme Court issued a denial of a Petition for Writ of Certiorari on September 3, 1996.

## CONSTITUTIONAL PROVISION INVOLVED

The first statement in the First Amendment of the United States Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

## STATEMENT OF THE CASE

In January of 1993, Dianne R. Winkler brought suit against Rev. Glenn Chambers, Grace United Methodist Church, and the Rocky Mountain Conference of the United Methodist Church on allegations of sexual harassment by Rev. Chambers from 1990 to 1992. The Grace Church settled out before trial for $23,500. On January 26, 1994 after a two-week trial, a jury returned a verdict against Rev. Chambers for breach of fiduciary duty in the sum of $57,350 and against the Rocky Mountain Conference for

negligent hiring and supervision in the sum of $95,853 and for breach of fiduciary duty in the sum of $10,651.

On negligent hiring and supervision, Dianne Winkler's "evidence" was to second guess the Conference's handling of information received over the years of Rev. Chambers' alcohol use and circumstances surrounding his first marriage breakup. On the fiduciary duty claim, her "evidence" was to second guess the Conference's following the Methodist Book of Discipline on a grievance against Rev. Chambers and claim a "fiduciary relationship" was created during the Rev. Chambers' disciplinary process were she was then permitted to speculate how the Conference failed to provide her own self-defined idea of what should have been done for her.

*The History of Rev. Chambers' Engagement as a Clergy With the Rocky Mountain Conference*

Rev. Glenn Chambers became a clergy member of the Rocky Mountain Conference of the United Methodist Church in 1965, after serving as clergy in a United Methodist Conference in west Texas from 1953 to 1965. He obtained his BA degree in 1953 from McMurray College and his Doctor of Divinity from Perkins School of Theology at Southern Methodist University in 1959. He was appointed to serve in the Methodist Church, Glenwood Springs, Colorado from June of 1965 to June of 1968 and at the St. Paul United Methodist Church, Colorado Springs, Colorado from 1968 to 1973. From 1973 to 1979 he served as one of the six district superintendents of the Rocky Mountain Conference assigned to the Pueblo, Colorado District at the request of Bishop Marvin Wheatley. In 1979 he was appointed to Grace United Methodist Church in Denver, Colorado after his maximum allowed six-year service as district superintendent.

In 1972 Bishop Marvin Stuart, then Bishop of the Rocky Mountain Conference (1964-1972), requested an inquiry into the break up of Rev. Chambers' first marriage as was the standard procedure under the Book of Discipline of the United

Methodist Church at the time to determine if there was any immoral conduct on the part of Rev. Chambers under the standards set in the Book of Discipline much in keeping with society's view of divorces at the time of having someone designated at fault in a marriage breakup. As a result, it was determined no immoral conduct occurred and no charges were brought against Rev. Chambers under the Book of Discipline. However, the committee of minister peers suggested Rev. Chambers and his wife should both seek "psychiatric counseling." This was based on a committee conversation with a psychiatrist, who was counseling Rev. Chambers' wife at the time but had seen Rev. Chambers on one occasion. Rev. Chambers did not attend any psychological counseling at the time and the Rocky Mountain Conference did not require him to do so. Rev. Chambers admitted for the first time during trial in this case a problem in the breakup of his first marriage on reflection was his alcohol use which he hid from the Rocky Mountain Conference.

In 1980 the second wife of Rev. Chambers, Lela Rhodes, advised Bishop Marvin Wheatley, then Bishop of the Rocky Mountain Conference (1972-1984), she believed Rev. Chambers had an alcohol use problem. Rev. Chambers had served as a district superintendent from 1973 until 1979 under Bishop Wheatley, during which period of time he was in the presence of Bishop Wheatley one week a month, many times for up to fourteen hours a day, during which time Bishop Wheatley did not, at anytime, associate alcohol with Rev. Chambers. Thus, Bishop Wheatley felt the use of alcohol by Rev. Chambers was not a factor in his performance as a member minister of the Rocky Mountain Conference. Sometime in the 1980s, District Superintendent Rev. Jim Keesey received a complaint of alcohol use by Rev. Chambers and he spoke to him at which time Rev. Chambers continued to deny his problem and stated if it was offensive to others, he would just quit. In the 1986 to 1990 time frame, the Associate Pastor at Grace United Methodist Church, Rev. Jan Munsey, whose life had been greatly affected by her parents' use of alcohol and the death of her brother from alcohol use, reported to District Superintendent Rev. Sam Day that she had

noted alcohol on Rev. Chambers' breath at the church and on one occasion had seen him go to his car and take a drink from a bottle. Rev. Day and the chairman of the Staff Parrish Relations Committee at Grace United Methodist Church, George Custard, frequently went fishing with Rev. Chambers. They arranged a fishing trip, and during this trip discussed with Rev. Chambers the reported concern of his alcohol use at the church. Again, Rev. Chambers denied his alcohol problem and responded he could stop drinking entirely. As before, there was no indication alcohol use was affecting his job performance. The Grace United Methodist Church Staff Parrish Relations Committee never brought to the Rocky Mountain Conference any further concern over alcohol use. The Grace Church Staff Parrish Relations Committee always requested the return of Rev. Chambers as its senior pastor each year for the thirteen years he was appointed to Grace Church without any expressed concern of any kind.

On March 19, 1992 District Superintendent Rev. Rush Hankins received from Carol Klein, a Grace United Methodist Church member, a written complaint alleging Rev. Chambers had sexually harassed her at Grace Church on a number of occasions since 1984. As a result, Rev. Rush Hankins and Bishop Roy Sano's, then Bishop of the Rocky Mountain Conference (1984-1992), initiated investigation into this official written complaint and the Bishop suspended Rev. Chambers' appointment at Grace Church. Rev. Rush Hankins ultimately held a meeting on April 24, 1992 at her home and invited all women with complaints about Rev. Chambers whose identify was known to Grace United Methodist Church and Carol Klein's counselor and his associates. Six women came to Rev. Rush Hankins' home and Dianne Winkler was one of these women.

Rev. Chambers had admitted to Bishop Sano and District Superintendent Rev. Rush Hankins on April 8, 1992, he had a problem with alcohol but denied sexually harassing women at anytime. He has maintained this position to present.

Rev. Chambers was immediately sent to a thirty-day alcohol treatment program and subsequently came under the care of

Dr. Jeffrey Metzner, a psychiatrist, for psychological evaluations at the request of the Rocky Mountain Conference. Just before the Annual Conference in June of 1992, Rev. Chambers was placed on a year's leave of absence because of the long process to deal with alcoholism plus the other concerns of the women. The Annual Conference in June of 1993 refused the 63-year-old Rev. Chambers' request for retirement based on 40 years in the ministry. In June of 1994 Rev. Chambers' retirement was allowed by the Annual Conference under a written agreement of severe restrictions not permitting him to hold himself out as a Methodist minister or to conduct any type of clergy functions.

One of the women who came to Rev. Rush Hankins' house for the April 1992 called meeting of women who had complaints about Rev. Chambers was Jan Place. Earlier in October of 1991, District Superintendent Rev. Rush Hankins had been contacted on the telephone by Jan Place. In the October of 1991 telephone call, Jan Place had complained Rev. Chambers was telephoning her at home, telling her he loved her and had made unwanted physical contact with her consisting of shoulder rubs and hugs. Rev. Rush Hankins explained, as required, the Book of Discipline mandate that a written complaint he made before a formal grievance process could be initiated. Jan Place declined to file an official compliant and Rev. Rush Hankins spoke with Rev. Chambers in person as requested by Jan Place. Rev. Chambers stated Jan Place's father has passed away and he had been showing her special concern because of this death. Rev. Chambers was asked not to further contact Jan Place and he did not.

Dianne Winkler, age 44, joined the Grace Church in October of 1988 with her third husband, who was a school teacher, because she was really lonely at the time. She was active in the women's group, became chairperson of the Evangelism Committee and her husband was active in the men's group. Winkler had a childhood history of sexual abuse by her uncle, a neighbor and a brother. She also had a history of severe emotional conflict with her mother in which her father had been un-supportive. Although a college graduate who obtained a high grade point

average and without children, she had been emotionally unable to handle employment since 1987. She had a pre-existing history of bulimia, depression, anxiety, emotional disorder and herpes. The herpes had caused her loss of family, friends and a job. Her husband suffers from Lupus since June of 1988 which required he stay out of sunlight, avoid stress and not fatigue. Her father passed away in 1989 and she had to help care for him during his last illness. By 1989, she felt mentally and physically tired. In January of 1990, she consulted a therapist to help her cope with her father's death and to try to overcome her phobia regarding work. She went on Prozac in January of 1990 and was under a doctor's care for her pre-existing conditions. In the spring of 1990, she started counseling with Rev. Chambers.

Diane Winkler alleges Rev. Chambers first improperly approached her in 1990 when she was alone painting a church classroom and inappropriately hugged her, kissed her hair and said he loved her. She alleges from 1990 to January of 1992, Rev. Chambers sexually harassed her on a number of occasions.

Following the meeting at District Superintendent Rev. Rush Hankins' home in April of 1992, Rev. Rush Hankins was in contact numerous times with Dianne Winkler while processing the Carol Klein complaint against Rev. Chambers, including locating a non-Methodist counselor to meet with the women who choose to hold group sessions which proved to be unsatisfactory. Rev. Sandra Stephens, a member of the Conference Joint Review Committee looking into the grievance against Rev. Chambers was designated as communication liaison with the women to keep them informed during the process. A great deal of resentment occurred in the Grace Church congregation directed at the Rocky Mountain Conference and the un-named women for the loss of Rev. Chambers. Dianne Winkler last attended Grace Church on June 12, 1992. In August of 1992, the Conference Joint Review Committee found the women's complaints "creditable." Dianne Winkler contacted a lawyer in November of 1992 and filed a lawsuit in January of 1993.

*The Organization of the United Methodist Church*

The United Methodist Conference operates under the Book of Discipline, which is descended from the original Book of Discipline, compiled by John Wesley, the founder of Methodism.

Within the United Methodist Church denomination, the basic operating unit is the Conference. The United States (and world) is geographically divided into a series of conferences. The Rocky Mountain Conference is a non-profit Colorado corporation which covers the states of Colorado, Utah and one-half of Wyoming. There are 256 churches and 400-plus ministers within the Conference. It is governed by a bishop, who is supported by a Cabinet consisting of six district superintendents. Each district superintendent is assigned to oversee a portion of the churches and ministers within the conference territory under the authority of the Book of Discipline. The district superintendent holds a Charge Conference in each charge/church at least once a year to review and evaluate the total mission and ministry of the church, receive reports, and adopt objectives, goals, purposes and priorities for the coming year. The district superintendent may be in contact with the ministers and churches at other times in the year on an as-needed basis for overseer responsibilities for the ministry of the pastors and churches under the Book of Discipline authority.

The clergy members of the Rocky Mountain Conference are subject to appointment by the bishop with advise of the Cabinet. The clergy person herself/himself is consulted as is the staff parrish relations committee at the local church before an appointment is made. The clergy member is considered self-employed and while a clergy member of the Rocky Mountain Conference is actually paid by the local church and subject to everyday supervision by the local church staff parrish relations committee. The "supervision" by the district superintendent under the Book of Discipline is defined as working with pastors in formulating statements of purpose for congregations in fulfilling their mission and with the staff parrish relations committee

to classify the pastors' proprieties of ministry to include observation, direct evaluation and feedback to the clergy involved.

Once a year The Discipline calls for an Annual Conference. This is a meeting held in June by the clergy members and lay persons of the Rocky Mountain Conference to review the past year and bring before the various bodies of the Rocky Mountain Conference for approval the actions taken through the year including actions on clergy membership.

The Rocky Mountain Conference does not play any part in who will be a lay member of each separate non-profit corporation church nor does it have any power to remove a lay member admitted by a church to membership. The clergy are not considered members of the individual church. The Discipline defines an internal grievance procedure for clergy, based on recognition that "Ordination and membership in an Annual Conference in The United Methodist Church is a sacred trust," and that the "qualifications and duties of local pastors . . . flow from the gospel as taught by Jesus the Christ and proclaimed by his Apostles."

The purpose of the clergy grievance procedure is " . . . the reconciliation and restoration of the person (clergy) and the strengthening of the church." If the remedial process is " . . . unfruitful, discontinuance or termination may follow." "A grievance is a written and signed statement claiming misconduct or unsatisfactory performance of ministerial duties. The person filing the grievance and the clergyperson shall be informed by the district superintendent or bishop of the process for filing the grievance and its purpose." The first step in the grievance procedure is "supervision," which is " . . . directed towards justice for and reconciliation between all parties . . . " and may include consultation with the Staff Parrish Relations Committee and mediation with " . . . trained neutral third party mediator . . . " When "supervision" does not achieve the desire results, the matter may be referred to the Joint Review Committee of the Conference's Board of Ordained Ministry.

The Board of Ordained Ministry is a standing committee of the Conference charged with enlistment, recruitment, ordination and standing of the clergy membership. The Joint Review Committee handles all complaints regarding clergy and is charged with resolution of the complaint under informal and confidential procedures. The Joint Review Committee " . . . shall guarantee that the person or persons lodging the complaint and the person against whom the complaint is lodged shall have the right to be heard." When resolution of the complaint is not achieved, the matter is referred back to the Board of Ordained Ministry. The Board of Ordained Ministry then develops a response based on the Joint Review Committee's report, to accommodate "the needs of the church and the ordained minister." It " . . . may recommend remedial action, discontinuance, leave of absence, administrative location, termination, or it may dismiss the complaint." In "rare instances," it may prefer charges to the Conference Committee on Investigation, for possible trial. The remedial action through the Cabinet and Board of Ordained Ministry shall be one or more of the following options, subject to Annual Conference review: (1) continued education, (2) leave of absence, (3) early retirement, (4) sabbatical leave, (5) honorable location, (6) surrender of ordained ministerial office, (7) personal counseling or therapy, (8) career evaluation, (9) peer support and supervision or (10) private reprimand.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULE OF FIRST AMENDMENT PROTECTION AGAINST INTERFERENCE WITH A CHURCH IN ITS ACTIONS INVOLVING CLERGY.

#### A. The Colorado Courts Have Failed to Fully Accept This Court's Prior Decisions That the Church Has Sole Authority Regarding its Clergy.

The principle that civil courts are required to accept as conclusive the decisions of the highest ecclesiastical judicatories

of a hierarchial church in religious matters involving clergy is established by the decision of this Court from *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-729 (1871); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church,* 344 U.S. 94, 113-115, 120-121 (1952) [later opinion, sub. nom. Kresshik v. St. Nicholas Cathedral of the Russian Orthodox Church, 363 U.S. 190 (1960)]; *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-449 (1969); and *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976).

The classic statement of the principle involved is the following often-quoted language from *Watson v. Jones*, 80 U.S. at 727, 729:

> "In this class of cases [hierarchical churches] we think the rule of action which should govern the courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding upon them, in their application to the case before them . . . "
>
> " . . .
>
> "It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."

In *Gonzalez* (280 U.S. at 16) this court phrased the principle as "Because the appointment [to a chaplaincy] is a canonical Act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."

In analyzing the constitutional principles applicable to the selection and removal of clergy by hierarchical churches, this Court stated in *Kedroff* (344 U.S. at 116):

> "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference."

In *Presbyterian Church In The United States* (393 U.S. at 667) this Court stated as to the constitutional principle involved, "The First Amendment prohibits a state from employing religious organizations as an arm of the civil judiciary to perform the function of interpreting and applying state standards."

In *Serbian Orthodox Diocese* (426 U.S. at 723) this Court stated, " . . . Civil courts are bound to accept the decisions of the highest judicatories of a religious organization of higher polity on the manners of discipline, faith, internal organizations, or ecclesiastical rule, custom or law."

**B. The Colorado Supreme Court Has Recognized This Court's Prior Decisions But Attempts to Avoid Them on its Own Created Exceptions**

In *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996) the Colorado Supreme Court stated, "The choice of a minister is an unique distillation of a belief system. Regulating that choice comes perilously close to regulating belief." "Whether the courts should intrude into ecclesiastical decisions regarding choice of a minister is an issue that bridges both religion clauses of the First Amendment, because it potentially involves governmental intrusion into both ecclesiastical and individual decision-making." "However, whether we look to Free Exercise Clause analysis or to Establishment Clause analysis, we find a church's choice of a minister is uniquely protected." "Because of the minister's unique role in the church, the appointment of a minister is inherently of prime ecclesiastical concern." All above *Id.* at 1126-1127. "The decision to hire or discharge a minister is itself

inextricable from religious doctrine." "Thus, the church's decision of who to hire as a minister necessarily involves religious doctrine." *Id.* at 1128. "The principle underlying the reasoning in all these cases is that the appointment of a minister is an expression of the beliefs of the church and the 'embodiment' of the religion." "In analyzing a church's choice of a minister, attempts to separate arguably impermissible discriminatory grounds for a decision from grounds stemming from the church beliefs excessively entangles a court with religion. Hence, the Establishment Clause insulates a religious institution's choice of a minister from judicial review." *Id.* at 1132-1133. "What we do hold is that a church's choice of who shall serve as its minister is inextricable related to religious belief and therefore invokes the protection of the First Amendment." *Id.* at 1134.

However, despite the Colorado Supreme Court's seemingly overwhelming words of understanding and support acknowledging this Court's pronouncements that a church's involvement with its clergy is a protected First Amendment right involving the very heart of religious belief and practice, at footnote 17 of *Van Osdol* (908 P.2d at 1132 and 1133) the Colorado Supreme Court continued to invade the very principle established by this Court on the Colorado Supreme Court's own created exception[1] by stating:

> "17. While claims for illegal hiring or discharge of a minister inevitably involved religious doctrine, that is not the case for a claim of negligent hiring of a minister. The claim of negligent hiring is brought after an employee has harmed a third party through his or her office of employment. An employer is found liable for negligent hiring if, at the time of hiring, the employer had reason to believe that hiring this person would create an undue risk of harm to others. *Connes v. Molalla Transp., System, Inc.*, 831 P.2d 1316, 1321 (Colo. 1992); Restatement (Second) of Agency § 213 cmt. d

---

[1] *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) and *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993).

> (1958). Hence, the court does not inquire into the employer's broad reasons for choosing this particular employee for the position, but instead looks to whether the specific danger while ultimately manifested itself could have reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs. See *Moses v. Diocese of Colo.*, 863 P.2d 310, 320-21 (Colo. 1993) (holding that although courts must not become embroiled in interpreting or weighing church doctrine, a claim of negligent hiring of a minister is actionable because it does not require such interpretation or weighing of religious belief but instead is merely application of a secular standards to secular conduct), *cert. denied*, U.S. , 114 S.Ct. 2135, 128 L.Ed.2d 880 (1994)."[2]

Even the above "exception" created by the Colorado Supreme Court was violated in the present case by allowing the total invasion of the Rocky Mountain Conference' hiring, supervision, disciplining and discharge (retirement under severe restrictions) of Rev. Chambers to be minutely examined and second guessed before the jury in total defiance of the First Amendment rights of the Rocky Mountain Conference. In reality, Dianne Winkler was allowed to invade and conduct arbitrary second guessing of the church's "broad reasons for choosing" Rev. Chambers, the church's every act of "supervision" of Rev. Chambers in his career from 1953 to 1992 and she was even allowed to invade the church's entire disciplinary proceeding with arbitrary second guessing right down to criticizing before the jury the church's ultimately allowing Rev. Chambers to retire

---

[2] Note in the present case, the allowed tort claims are not just negligent hiring but also negligent supervision and fiduciary duty. In addition, both *Destefano, supra,* and *Moses, supra,* allow additional tort claims of "outrageous conduct" and "vicarious liability by ratification" against churches as well as the above.

with severe restrictions which she somehow relates to her damages.

In addition, Dianne Winkler was allowed under the Colorado Supreme Court's "exceptions" to even claim a "fiduciary relationship" was somehow created with her by the Rocky Mountain Conference during the very processing of Rev. Chambers disciplinary proceedings under the Book of Discipline. This "fiduciary duty" to Dianne Winkler required she become the primary focus of the Conference's actions and the Book of Discipline, the Conference, Rev. Chambers, the United Methodist Church and all other women involved were to be secondary.[3] She was then permitted to speculate this "fiduciary duty" was breached because the Rocky Mountain Conference failed to provide her own self-defined ideas of what should have been done for her and what should have been done differently regarding Rev. Chambers' grievance process.

**II. THE COLORADO STATE COURT HAS IDENTIFIED NO COMPELLING INTEREST TO JUSTIFY THE SUBSTANTIAL BURDEN ON THE ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH RELIGIOUS ACTIVITY FOR PERMITTING DIRECT TORT CLAIMS.**

In cases under the Free Exercise Clause, this Court has applied the compelling state interest test. *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb also mandates the use of this test in Free Exercise cases. The compelling state interest requires a three-stage analysis: (1) whether the conduct in question is motivated by a sincerely held religious

---

[3] In a subsequent conflicting ruling a separate three-judge division of the sixteen member Colorado Court of Appeals correctly held the Rocky Mountain Conference in a different case could not have a fiduciary duty to a complainant during a disciplining proceeding against a clergy under the Book of Discipline. See *Bohrer v. DeHart,* P.2d (Colo. App. 1996), cert. pending, copy attached in Appendix C pgs. 23a to 44a.

belief; (2) whether the state action infringes on the free exercise of religion; and (3) whether there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. *Wisconsin v. Yoder, supra,* 92 S.Ct. at 1532. The third stage of this analysis requires a balancing of interests: whether the state's interest is so compelling that the church's free exercise interest must give way. If an overriding state interest is demonstrated, the state must use the least intrusive means to protect that interest. *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Thomas v. Review Board,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Church of the Lukumi Babalu Aye. Inc. v. City of Hialeah, U.S. , 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).*

The Colorado courts have entirely disregarded this test in cases of this type. The hiring, supervision, disciplining, and discharge (severely restricted retirement) of Rev. Chambers in this case by the Rocky Mountain Conference of the United Methodist Church pursuant to the Book of Discipline without question is motivated by a sincerely held religious belief. The state action of allowing tort claims of negligent hiring, negligent supervision and fiduciary duty infringes on the Conference's free exercise of religion. The Colorado Supreme Court so acknowledged in *Van Osdol, supra.* Thus, the only issue is whether the state interest in allowing tort claims is of sufficient magnitude to override the interest of the Rocky Mountain Conference under the Free Exercise Clause and, if so, what is the least intrusive means to protect that compelling interest. The Colorado courts have completely failed to even address this issue in this case.

There is no compelling state interest of sufficient magnitude to justify intrusion into the protected religious rights of a church to hire, supervise, discipline and discharge its clergy free from tort claims involving allegations of sexual misconduct of clergy which is without argument conduct out of the course and scope of a clergy's work. The asserted "compelling state interest" in this case is apparently to discourage sexual harassment of

women by clergy. The least intrusive means would obviously be to focus on the conduct itself. It is not necessary to restrict the United Methodist Church's free exercise of religion in the United Methodist Conference to prevent such conduct. The Rocky Mountain Conference of the United Methodist Church did not sexually harass any women and had no prior knowledge of Rev. Chambers alleged propensity to do so until the incident which ultimately led them to identify Dianne Winkler as one of several women who claimed such conduct by Rev. Chambers. Further, the United Methodist Church denomination had in place a fair structure in the Book of Discipline to deal with such serious complaints without allowing them to be ignored or turned into a clergy witch hunt. The method used by the Colorado court is not the least intrusive means to protect women from sexual misconduct of clergy. The least intrusive means is by direct action on the out of course and scope clergy conduct not the church's religious activity of selecting, supervising, disciplining and discharging its clergy.

In *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), Justice Scalia, of this Court, writing for a plurality, stated that a neutral law of general applicability may be given effect, even though it has the incidental effect of burdening a free exercise of religion, without triggering the Compelling State Interest analysis. There the petitioner was denied unemployment compensation benefits after he was fired form his job for using peyote in Native American religious rituals. Under Oregon and federal law, peyote is a controlled substance, the use or possession of which is a criminal offense, but Smith argued that his use was constitutionally protected. Writing for a plurality, Justice Scalia conducted an analysis focusing on the fact that the criminal statutes prohibiting use or possession of peyote were neutral laws of general applicability, which were applicable cross the board, and did not depend on the religious context in which the defendant happened to be using peyote. Since this was a neutral law of general applicability, the state's

actions, in denying unemployment compensation benefits to Smith because he was fired for illegal conduct, was upheld.[4]

However, in the later case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* U.S. , 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), this Court acknowledged the holding of *Employment Division v. Smith,* but nevertheless returned to the Compelling State Interest Test, because the ordinances there in question were not "neutral laws of general applicability" as applied. Justice Kennedy noted that:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' *Gillette v. United States,* 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), and 'covert suppression of particular religious beliefs,' *Bowen v. Roy* (476 U.S. 693) at 703, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."

113 S.Ct. at 2227.

---

[4] In the wake of *Employment Division v. Smith,* commentators expressed great consternation about the prospect that the *Smith* case might have effectively abolished the Compelling State Interest Test, and gelded the Free Exercise Clause. See, Case Note, *Employment Division v. Smith: A Great Step Backwards in Free Exercise Jurisprudence,* 1991 B.Y.U.L. Rev. 1331 (1991) and Case Note, *Employment Division v. Smith: Free Exercise Clause Loses Balance on Peyote,* 43 Baylor L. Rev. 577 (Winter 1991). See, also, *Miller v. Civil City of South Bend,* 904 F.2d 1081, 1102-1103 (7th Cir. 1990); *United States v. Philadelphia Yearly meeting of the Religious Soc. of Friends,* 753 F.Supp. 1300 (E.D. Pa. 1990); and *Minnesota v. Herschberger,* 462 N.W.2d 393 (Minn. 1990). In response to the concerns expressed about *Employment Division v. Smith,* Congress adopted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, sometimes referred to as the "RFRA."

In *Wisconsin v. Yoder, supra,* this Court had earlier said that "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 92 S.Ct. at 1536. However, there seems to have been speculations that *Employment Division v. Smith* applied anytime a law was facially neutral. *Church of the Lukumi Babalu Aye* indicates the contrary.

Tort claims for negligent hiring/supervision and fiduciary duty against the Rocky Mountain Conference of the United Methodist Church are not neutral laws of general applicability. Neutrality and general applicability are distinct and separate requirements. In *Church of the Lukumi Babalu Aye,* Justice Kennedy noted that these concepts are interrelated, and that a law which fails to satisfy one requirements will in all likelihood, fail to satisfy the other (113 S.Ct. at 2226), but failure to satisfy either requirement triggers a Compelling State Interest analysis. Neutrality is the first element. As stated above, neutrality on its fact may not be neutral as applied. "Improper targeting" of religious activity is an indication of non-neutrality, and the expressions of purpose associated with the enactment of a law may demonstrate improper targeting.[5] Here, the problem of applying these constitutional principles is complicated because we are dealing with common law causes of action rather than statutes. Nevertheless, the decisions handed down by the Colorado Supreme Court in *Destefano* and *Moses* themselves demonstrate this constitutionally impermissible targeting.

In *Destefano,* the Colorado court implicitly recognized that a cause of action for "clergy malpractice" would not be even *facially* neutral. Therefore, the court declined to recognize that cause of action. However, as a surrogate for "clergy malpractice," the court reinvented the established claim for "breach of fiduciary duty," lifting it out of its traditional context, where it

---

[5] Note that, in evaluating whether the real object of the ordinances was to target conduct because it was religiously motivate, Justice Kennedy took guidance from equal protection cases. 113 S.Ct. at 2230-2231.

served to impose liability on defendants who misused their control over a plaintiff's financial affairs. The concept of fiduciary duties evolved to deal with situations where one person exercises control over the financial affairs of another. Fiduciary law developed to provide a "moral dimension to the body of law that regulates economic activity." N. Schaumann. *The Lender and Unconventional Fiduciary,* 23 Seton Hall L. Rev. 21 (1991). Even as to a true fiduciary, not all duties owed are "fiduciary" duties:

> "Finally, fiduciary duties do not include a duty of care. Fiduciaries often owe a duty of care to their beneficiaries, which in some, but not all, cases is more demanding than that owed the general public, **but not every duty owed by a fiduciary to a beneficiary is a 'fiduciary duty.'** It serves no useful purpose so to expand the idea of fiduciary duty. Although fiduciary status at times may be relevant to assessing the duty of care owed a beneficiary, the duty of care is defined and governed not by fiduciary law but by tort (and sometimes contract) law. Clarity of analysis is enhanced by maintaining this distinction. Tort law is no more 'fiduciary' than is tax law, although most fiduciaries are subject to both."

23 Seton Hall L. Rev. at pp. 30-31 (emphasis added). Disregarding these consideration, *Destefano* expanded breach of fiduciary duty for the purpose of imposing liability on religious organizations and clergy.

Aside from *Destefano v. Grabrian* and *Moses v. Diocese,* all the later Colorado fiduciary duty cases finding a fiduciary duty have likewise involved financial control See, e.g., *Rubenstein v. South Denver Nat'l Bank,* 762 P.2d 755 (1988), cert. den. (1989); and *Zick v. Krob,* 872 P.2d 1290 (Colo. App. 1993).

Thus, it is apparent that the traditionally narrow concept of breach of fiduciary duty was transformed in *Destefano* for the precise purpose of imposing liability on the Catholic Church based on its status as a religious organization and the priest based on his status as a Catholic priest who provided pastoral counseling. This transformed cause of action is now being used to get other religious organizations and clergy on their status as religious entities.

In *Moses v. Diocese,* defense counsel raised the argument that the manifestation of "breach of fiduciary duty" recognized in *Destefano v. Grabrian* was simply another way of denominating a claim for clergy malpractice. The Colorado Supreme Court rejected that argument, on the basis that the clergyman's liability for breach of fiduciary duty was unrelated to his "professional" status as a clergyman, which the court said would justify treating that claim differently from a claim for "clergy malpractice":

> "The fundamental difference between the two causes of action is the former is a breach of trust and does not require a professional relationship or a professional standards of care, while the latter is an action for negligence based on a professional relationship and a professional standard of care. In *Destefano,* we held the defendant owed a fiduciary duty to the plaintiff that 'was created by his undertaking to counsel [the plaintiff].' *Destefano v. Grabrian,* 763 P.2d 275, 284 (Colo. 1988). The position of trust occupied by the defendant, when coupled with his positive act of counseling the plaintiff, resulted in a duty to the plaintiff. The relevant common facts in Destefano and Tenantry's case are not the profession of the defendants; the relevant facts are that the defendants in both cases occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty. In Colorado, breach of fiduciary duty is actionable, clergy malpractice is not. *Id.* at 384-86."

863 P.2d at 321, footnote 13 (emphasis supplied). However, just as Father Grabrian's "position of trust" in *Destefano* was his position as a Catholic priest, and the counseling he undertook was pastoral counseling, Bishop Frey's "position of trust" in the Moses case was his "superior position **as a counselor, a bishop, and a final arbiter of problems with the clergy.**" 863 P.2d at 322 (emphasis added). The court referred to Bishop Frey's "position of authority in the church," which gave him "the power to resolve conflicts in the church." Id. The court also referred to the plaintiff's belief that Bishop Frey "had the power to decide if she would lose her salvation. *Id.* The court also stated that, although the "clergy-parishioner" relationship is not necessarily a "fiduciary" relationship, it does "involved the type of interaction that creates trust and reliance," and ended with the statement "Courts have recognized the fiduciary nature of the clergy-parishioner relationship." *Id.*

Therefore, even though the black and white statement of the expanded cause of action for "breach of fiduciary duty" may suggest facial neutrality, when this tort cause of action is applied to religious organizations and clergymen, it is not neutral. When a religious organization and clergymen are sued for breach of fiduciary duty, it is their status as a religious entity and clergyman which allegedly gives rise to the existence of a fiduciary duty, and plaintiffs' counsel generally make the effort (as they did in this case) to establish the existence of a pastoral counseling relationship since that is the one context in which the Colorado Supreme Court has ostensibly found this new species of fiduciary duty. A civil claim for breach of fiduciary duty which grows out of that religious status cannot possibly constitute a neutral law of general applicability. As applied to the religious institution, the fiduciary duty is premised on its status as a church, and more particularly on its status as a church providing a process for clergy complaints. As applied to the individual defendant, the fiduciary duty is premised on his status as a clergyman, and more particularly on his status as a clergyman providing pastoral counseling. The fact that a stockbroker may be subject to breach of fiduciary duty in the course and scope of his employment for

churning his client's stock investments, or his employer as respondeat superior, or that a lawyer may be subject to breach of fiduciary duty for dissipating funds which he holds in trust for a client, or his firm as respondeat superior, does not make this new form of fiduciary law a "neutral law of general applicability" when it is used to impose liability only on a church because of its status as a religious body or on the individual clergy status **as a clergyman.**

Furthermore, it is critical to note that this cause of action for breach of fiduciary duty is not applied in the same manner to other types of defendants as to clergymen. In *Crystal Homes v. Radetsky,* 895 P.2d 1179, 1182 (Colo. App. 1995), the plaintiff tried to sidestep the requirement that a client suing a lawyer for professional malpractice must present expert testimony establishing a standard of care and the lawyer's breach thereof, by suing for breach of fiduciary duty, based on the alleged existence of a "confidential relationship between the parties independent of any lawyer-client relationship." Although the Court of Appeals acknowledged the *Moses* decision, it went on to say that "the foundation for any confidential or fiduciary relationship asserted here was necessarily based upon the alleged attorney-client status between the parties," since there was "no other basis alleged for plaintiff's asserted justifiable reposition of special trust or confidence in defendant." Thus, the court ruled that any duties owed by the defendant attorney "would be measured against standards applicable to attorneys." Thus, when the plaintiff is making a claim against his attorney, based on his status as an attorney, the plaintiff is relegated to a legal malpractice claim. He cannot transform this into a "breach of fiduciary duty claim," even though his evidence shows the requisite "justifiable reposition of special trust or confidence" in the defendant. When the defendant is a church or clergyman, however, the plaintiff is allowed to invoke the transformed cause of action for "breach of fiduciary duty," precisely because no "clergy malpractice" claim is available against such defendants. This demonstrates that the

transformed "breach of fiduciary duty claim" has been appropriated to accomplish indirectly what the Colorado court recognized it could not accomplish directly. As Justice Kennedy recognized in *Church of Lukumi Babalu Aye,* "the effect of a law in its real operation is strong evidence of its object." 113 S.Ct. at 2228.

*Lukumi Babalu Aye* also held that one ordinance was not neutral because it represented "a system of 'individualized governmental assessment of the reasons for the relevant conduct.' " 113 S.Ct. at 2229. Similarly, the essence of these common law claims is to establish a system of individualized governmental assessment of the reasons for the defendant's conduct.[6]

The cause of action for "breach of fiduciary duty," as applied to impose liability on clergymen and religious institutions, also fails as a law of "general applicability." In *Employment Division v. Smith,* the statute prohibiting the use or possession of peyote was considered to be a law of general applicability precisely because it applied to everyone. When the peyote statute was applied to Smith, it was not applied to him because of his status as an adherent of a native American religion. The fact that the application of this general law burdened Smith's religious practice was treated as an "incidental effect." In this case, the transformed cause of action for "breach of fiduciary duty," on its

---

[6] It is worth noting that *Lukumi Babalu Aye's* neutrality analysis also borrowed a variant of the "least restrictive means" test, finding "significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribed more religious conduct than is necessary to achieve their stated ends." 113 S.Ct. at 2229. This court later noted that "narrower regulation would achieve the city's interest in preventing cruelty to animals. . . . [R]egulation of condition and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. . . . If the city has a real concern that other methods are less humane, . . . the subject of the regulation should be the method of slaughter itself not a religious classification that is said to bear some general relation to it." 113 S.Ct. at 2230. "[T]he ordinances suppress more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense." 113 S.Ct. at 2231. This brings the analysis full circle.

face does not apply to everyone, but only to certain persons or religious institutions considered to be in a superior position in whom trust has been reposed. Furthermore, as applied to impose liability on church or clergymen, it is precisely their status as churches or clergymen which triggers the liability.

*In Lukumi Babalu Aye,* Justice Kennedy concluded that it was not necessary there to "define with precision the standard used to evaluate whether a prohibition is of general application," because the City of Hialeah's ordinances were clearly too under inclusive to qualify. 113 S.Ct. at 2232. The court held that, to the extent the city might have had legitimate interests in protecting the public health and preventing cruelty to animals, the ordinances should have been directed at conduct contrary to these interests without regard for who might engage in that conduct. Because they were tailored to "rituals" and "sacrifices," the ordinances were not "generally applicable." In this case, the transformed cause of action for "breach of fiduciary duty," is not generally applicable on its face, and it is certainly selectively applied to clergymen and religious institutions. Conduct-oriented government action (such as a criminal assault statute or the civil tort of battery) may be "generally applicable," but this status-based claim is not.

Thus, the transformed cause of action for "breach of fiduciary duty" recognized and applied in *Destefano v. Grabrian* and *Moses v. Diocese* is neither a neutral law nor a law of general applicability. That requires that its application to the Rocky Mountain Conference be strictly scrutinized under the Compelling State Interest Test, given the assumed religious motivation. However, as noted, the Colorado courts have completely ignored the compelling State Interest Test and have not even addresses its requirements.

## III. A DECISION OF THIS COURT IS NECESSARY IN ORDER TO HAVE COLORADO FOLLOW THIS COURT'S PRIOR RULING AS THE MAJORITY OF OTHER COURTS HAVE DONE

The issue that a church when hiring, supervising, disciplining and discharging clergy is inextricable involved in religious activity protected by the First Amendment of the United State Constitution and not subject to tort claims has been litigated extensively in the past few years in numerous jurisdictions. The overwhelming majority of courts who have considered this issue have been held no tort claims are allowed. A few jurisdictions have considered narrow exceptions. Colorado has been the most liberal and permits wide ranging exceptions.

**A. Other Jurisdiction Have Followed This Court's Ruling.**

In *Roman Catholic Bishop v. Superior Ct.,* 50 Cal. Rptr. 2d 399 (Cal. App. 4 Dist. 1996), where a priest sexually molested a child, the church was granted a summary judgment on a writ of mandamus. The court stated on negligent supervision "The vow of celibacy by clergy is a religious decision based upon religious belief; it does not create a civil duty" and "under the free exercise clause of the First Amendment, the state may not compel affirmation of a religious belief nor impose requirements based on belief in any religion" *Id.* 406. On negligent hiring, the court stated "There is nothing in the record to indicate [the priest] had a criminal history or had been previously implicated in sexual abuse of a minor. Thus the church could not have had antecedent knowledge of [the priest] purported criminal dangerousness" and "Here there was no compelling state interest to require the employer to investigate the sexual practice of its employee." *Id.* 404.

In *Pritzloff v. Archdiocese of Milwaukee,* 533 N.W.2d 780 (Wis. 1995), where a priest had a sexual relationship with a woman, the court held claims of negligent hiring, retaining, training and supervision against the church were barred by the First Amendment stating, " . . . We conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." *Id.* 790.

In *Isely v. Capuchin Province,* 880 F.Supp. 1138 (E.D. Mich. 1995), where a student alleged sexual abuse by priests, the dismissal of a negligent hiring claim against the church was upheld. The court stated, "It is well-settled that when a court is required to interpret Canon Law or internal church policies and practices, the First Amendment is violated because such judicial inquiry would constitute excessive government entanglement with religion." *Id.* 1150.

In *Roppolo v. Moore,* 644 S.2d 206 (La. App. 4th Cir. 1994) (cert. denied 650 S.2d 253), where a husband's action was refused against a priest and diocese on a wife's suicide after an adulterous affair with the priest, citing *Serbian v. Orthodox Diocese, supra; Schmidt v. Bishop,* 779 F.Supp. 321 (S.D.D.N.Y. 1991); *Nally v. Grace Community Church of the Valley,* 253 Cal. Rptr. 97, 763 P.2d 948 (Cal. 1988); and *Young v. Northern Ill. Conference of the United Methodist Church,* 818 F.Supp. 1206 (N.D. Ill. 1993), 21 F.3d 184 (7th Cir. 1994) where the court held, "when it comes to establishing the criteria for determining and then making the determination regarding who should preach from the pulpit, comfort the dying, visit the imprisoned, discuss morality, set an example for all to see, explain church dogma, expound on the meaning of faith hope and charity, and carry on the mission of the church, *such decisions* are wisely and *constitutionally* left to the wearers of the religious rather than the judicial robe. It therefor become prudent to avoid the temptation to get involved in religious affairs of the defendants; courts should avoid questions pertaining to a church's governance or hierarchy." (Emphasis supplied.)

In *Dausch v. Ryske,* 52 F.3d 1425 (7th Cir. 1994), aff'd in part and rev'd in part, 1993 WL 34873 (N.D. Ill. 1993), a minister started a sexual relationship during counseling. The claims against the church were dismissed by the trial court, including negligent hiring, negligent supervision, and breach of fiduciary duty. The Circuit affirmed, holding that claims based on "any inquiry into the policies and practices of church defendants in

hiring or supervising their clergy is barred by the First Amendment because it might foster excessive state entanglement with religion," *Id.* The court cited the earlier case of *Schmidt v. Bishop,* 779 F.Supp. 321 (S.D.D.N.Y. 1991), for its holding that, "in analyzing and defining the scope of fiduciary duty owed persons by their clergy, the court would be confronted with the same constitutional difficulties encountered in articulating the generalized standard of care for a clergyman (church) required by the law of negligence."

In *Dausch v. Ryske, supra,* the court further stated "Finally, the court dismissed Mrs. Dausch's counts concerning the church defendants' negligent hiring, training, and supervision of Ryske because adjudication of such claims would foster excessive state entanglement with religion."

In *Bladen v. First Presbyterian Church,* 857 P.2d 789 (Okla. 1993), in an adulterous affair of minister with wife while providing marital counseling to the couple, the court held counseling is solely a religious activity rejecting specifically *Destefano, supra.*

In *Schieffer v. Catholic Archdiocese of Omaha,* 508 N.W.2d 907 (Neb. 1993) where there was a sexual relationship between a priest and parishioner while counseling, the court distinguishing in part *Destefano, supra,* and rejected the remaining premises.

**B. A Few Jurisdictions Have Authored Narrow Exceptions Contrary to This Court's Ruling.**

The Ohio courts have rejected all tort claims against religious organizations except negligent hiring, contrary to this Court's ruling, but, different than Colorado trial courts, require the specific pleading and proof of facts that the person hired had a past history which had a nexus to the complained of conduct. *Byrd v. Faber,* 565 N.E.2d 584 (Ohio 1991) where the court noted "If the state becomes involved in assessing the adequacy of these standards, serious entanglement problems may exist under the First Amendment." In *Mirick v. McClellan,* 1993 W.L. 156303 (Ohio App. 1 Dist. 1994) the court dismissed plaintiff's claims of inadequate oversight of a molester for lack of adequate pleading

of the Episcopal Church's pre-assault knowledge of the persons' propensities. Likewise, in *Jones by Jones v. Trane,* 591 N.Y.S.2d 927 (Sup. 1992) in a case involving a suit by a mother and son against a priest and church for the priest's alleged molestation of the son held the church is only exposed to liability where there was a sufficient showing of notice of perverted proclivities, citing *Byrd, supra.* In Colorado trial courts, experienced has shown not only do plaintiffs not have to plead conduct showing a logical nexus to the complained of sexual misconduct but, as in the present case, can bring in anything and everything about the hiring, supervision and discharge of the minister whether or not it bears any nexus to the underlying alleged sexual harassment claimed such as by Ms. Winkler and denied by Rev. Chambers in this case.

## CONCLUSION

The Colorado court has allowed tort claim against a church when engaged in hiring, supervising, disciplining and discharging clergy despite this court's holding such religious activity is inextricable involved with and protected by the First Amendment. The Colorado court has totally ignored this court's requirement of the need to establish a compelling interest to justify placing a severe burden on religious organizations exercise of religion.

Respectfully submitted,

Neil Quigley
QUIGLEY & BRUCE
Attorney for Rocky Mountain
Conference of the United
Methodist Church
1010 Cherry Tower
950 South Cherry Street
Denver, Colorado 80222
(303) 691-6030

Dated this 27th day of November, 1996.

# APPENDIX A



**COLORADO COURT OF APPEALS** **November 9, 1995**
**No. 94CA0652**
**No. 94CA0661**

DIANNE R. WINKLER,

*Plaintiff-Appellee,*

*v.*

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, A COLORADO NON-PROFIT CORPORATION, AND GLENN CHAMBERS,

*Defendants-Appellants.*

**Appeal from the District Court**
**of the City and County of Denver**
**Honorable John N. McMullen, Judge**
**No. 93CV378**

**Division V** **JUDGMENT AFFIRMED IN PART**
**Opinion by JUDGE ROY** **AND REVERSED IN PART**
**Ruland and Rothenberg, JJ., concur**

Holland, Seelen & Pagliuca, Brian K. Holland, Joyce A. Seelen, Denver, Colorado, for Plaintiff-Appellee

Quigley & Bruce, Neil Quigley, Bruce A. Logan, Denver, Colorado, for Defendant-Appellant Rocky Mountain Conference of the United Methodist Church

Keller, Wahlberg & Morrato, P.C., James J. Morrato, Denver, Colorado, for Defendant-Appellant Glenn Chambers

In this consolidated appeal, defendants, Glenn Chambers and Rocky Mountain Conference of the United Methodist Church (Conference), appeal from the judgment entered on jury verdicts in favor of plaintiff, Dianne R. Winkler, based on claims that Chambers and the Conference breached their fiduciary duty to Winkler, that the Conference negligently hired or supervised Chambers, and that Chambers engaged in extreme and outrageous conduct. The Conference also appeals the trial court's awards of costs to Winkler. We affirm in part and reverse in part.

Chambers served as senior pastor to Grace United Methodist Church by appointment from the Conference from 1979 until he was suspended in April 1992 because of allegations of misconduct. Throughout his employment, Chambers had an alcohol problem dating to 1972 of which the Conference was aware.

In 1980, the Conference was informed of an incident concerning Chambers attributable to the abuse of alcohol. In 1986, a woman associate pastor of Grace Church told a District Superintendent for the Conference that Chambers had inappropriately touched her, but requested no further action as she "would take care of it." In October 1991, a parishioner reported to a Conference pastor alleging inappropriate conduct by Chambers, but did not file a formal complaint. At trial, this parishioner testified that she told the Conference that she did not like the way Chambers spoke to her and the fact that "he always seemed to be around" her when she was at church.

Winkler joined Grace Church in 1988 and thereafter began to volunteer her services for a variety of activities including the remodeling of a classroom. Winkler engaged in the volunteer activities, in part, on the recommendation of her therapist to work in a "safe" environment to overcome her fears of the workplace. Winkler's volunteer work caused her to be in contact with Chambers during the off hours. It was this contact with Chambers that led to her lawsuit.

While Winkler testified as to other incidents of improper conduct by Chambers, three incidents set forth the context upon which her claims were based:

(1) Winkler testified that, in August 1990, as she was remodeling a classroom, Chambers approached her, and after some initial conversation he put his arm around her, caressed her back, and told her: "You are really beautiful." He then started stroking her hair and said, "I love you, Dianne; you mean so much to me." After he left, Winkler stated that she felt physically ill, held herself tightly, and cried.

(2) A few days following the first incident, Winkler went to discuss a matter with Chambers in his office. They sat next to each other on a small couch, and he stroked her leg on the inside of her thigh and expressed his love for her. Winkler stated that she tried to ignore his touch and left the room as soon as he answered her question.

(3) In January 1992, Winkler was in a storeroom when Chambers entered the room. He came up to her, put his hand on the left side of her body, and rubbed his body up and down on her right side. He also bumped her and moved his hands up to the side of her breast and told her he "really loved her" and "did she hear what he was saying." Shortly thereafter, when she left the storeroom and told two women she met that she was "sick of" Chambers touching her, one responded, "Oh my God, not you too."

In March 1992, a formal inquiry into Chambers' inappropriate conduct with women began when another woman parishioner filed a formal complaint with church authorities. In partial response to this formal complaint, a Conference pastor held a meeting on April 24, 1992, at her home. This Conference pastor was the same individual who had received the 1991 report. Just prior to the meeting, the Conference suspended Chambers for three months.

Six women, including Winkler, attended the meeting. Winkler testified that the other women described instances of unwanted verbal comments and physical contact. Winkler further stated that all of the women were asked to file written complaints detailing their experiences with Chambers.

Winkler filed suit against Chambers, Grace Church, and the Conference on January 22, 1993, alleging breach of fiduciary duty and outrageous conduct against Chambers; breach of fiduciary duty, negligent hiring or supervision, and outrageous conduct against both Grace Church and the Conference; and vicarious liability by ratification against Grace Church. Winkler also sought punitive damages against all three defendants.

Chambers admitted that he had a long-term problem with alcohol. He stated that he did not remember most of the incidents about which Winkler and the others testified and that it was his general demeanor to be open and affectionate with members of the congregation both verbally and physically. As to those incidents he did remember, he stated that any verbal comments were misunderstood and that the physical contact was incidental.

Prior to trial, Grace Church settled all claims with Winkler for $23,500, and it was dismissed from the proceedings pursuant to stipulation.

After a twelve-day trial, the jury returned special verdicts in favor of Winkler against Chambers on the breach of fiduciary duty claim totaling $28,675, and on the outrageous conduct claim in the amount of $28,675. The jury also returned special verdicts in favor of Winkler and against the Conference on the claim for negligent hiring and supervision totaling $95,853, and on the breach of fiduciary duty claim in the amount of $10,651. The trial court awarded costs of $2,918.58 against the Conference based on an offer of settlement [judgment] made pursuant to § 13-17-202, C.R.S. (1995 Cum. Supp.), and awarded costs of $13,067.96 against both Chambers and the Conference jointly

and severally pursuant to § 13-16-104, C.R.S. (1987 Repl. Vol. 6A).

Initially, we address and reject the Conference's contention that the Establishment Clause of the First Amendment bars Winkler's claims against it.

The Conference contends that the "Book of Discipline," which governs the manner of ordaining ministers, their election to membership in the Conference, the responsibilities of membership in the Conference, and the manner of discipline and removal, embodies religious beliefs that are protected. Thus, it argues, its handling of the Chambers matter and its processing of the complaints against him are protected under the First Amendment. The Conference further argues that the jury's consideration of Chambers' history with the Conference under theories of negligent hiring or supervision infringes upon protected beliefs.

In both *Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988) and *Moses v. Diocese of Colorado,* 863 P.2d 310 (Colo. 1993), *cert. denied,* U.S. , 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994), our supreme court held that claims of breach of fiduciary duty, negligent hiring or supervision, and vicarious liability in civil actions against clergy members and their supervisors are viable if they are supported by competent evidence in the record. Notwithstanding the Conference's assertions that those cases were wrongly decided, they are controlling precedent dispositive of the Conference's arguments. *See also DeBose v. Bear Valley Church of Christ,* 890 P.2d 214 (Colo. App. 1994) (*cert. granted* June 19, 1995).

Furthermore, we note that neither Chambers nor the Conference contend that Chambers' method of communicating with parishioners by touching, hugging, and expressing affection was based on any religious tenet or belief. *Cf. DeBose v. Bear Valley Church of Christ, supra.* Therefore, we conclude that the trial court properly rejected the Conference's defense based on the First Amendment.

## II.

Next, the Conference and Chambers each contend that there was insufficient evidence of a fiduciary relationship with Winkler to create liability. We disagree.

The existence of a fiduciary relationship is a prerequisite to a finding of a fiduciary duty. A fiduciary relationship may arise when one person occupies a superior position relative to another. *See Moses v. Diocese of Colorado, supra;* Restatement (Second) of Torts §874 (1979).

A fiduciary is a person having a duty, created by his or her undertaking, to act primarily for the benefit of another in matters connected with the undertaking. A fiduciary's obligations include a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries. *Destefano v. Grabrian, supra.*

Fiduciary liability requires not only a repose of trust, but an assumption of a duty and a breach of that duty. Whether a fiduciary relationship exists is a question of fact to be resolved by the jury. *Moses v. Diocese of Colorado, supra.*

Winkler asserts that Chambers entered into a fiduciary relationship with her by counseling her on personal matters. She testified that the counseling sessions frequently took place on an informal basis and that during these sessions they discussed numerous intimate matters involving herself and her family. She further argues that Chambers breached his fiduciary duties to her by his conduct.

Chambers argues that the evidence does not support the proposition that there was any counseling relationship, but rather, at most, that he and Winkler had a normal clergy-parishioner relationship, which is not necessarily fiduciary in nature.

With respect to the Conference, Winkler asserts that a fiduciary relationship was created by the Conference assuming control of the investigation of her complaints and those of

others. Winkler argues that such a fiduciary relationship was created by: (1) the Conference's actions at the April 24, 1992, meeting at which the Conference seemed very concerned about the women and wanted them to stay together and be supportive of each other; (2) the Conference providing a therapist to help the women; and (3) the Conference preparing and sending a letter to the Grace Church congregation stating that:

> We are equally concerned for the healing of any persons who have been hurt. They will continue to receive appropriate help for their healing and restoration.

Based on these actions, Winkler testified that she trusted the Conference and felt that it would take care of and protect her.

Winkler argues that the Conference breached its fiduciary duties to her by: (1) failing to provide adequate counseling to the affected women; (2) undermining the credibility of the women by telling the congregation of Grace Church that there was nothing in Chambers' personnel file that indicated he had problems; (3) failing to protect the women who had brought complaints against Chambers from ensuing verbal attacks that were directed towards the women, who remained unidentified, as a group; and (4) not sending a letter to the congregation stating that it had found the women's complaints credible.

The Conference contends that it was engaged only in the processing of the complaints and that it did not assume a duty to act in Winkler's best interest.

Here, the jury was instructed on the requisite elements of a fiduciary relationship and determined that a fiduciary relationship existed between Winkler and Chambers and Winkler and the Conference, that Chambers and the Conference breached that duty, that Winkler suffered damages as a result, and that Winkler's damages were proximately caused by the respective breaches. That determination will not be reversed if there is a reasonable basis in the record to support it. *See Moses v. Diocese of Colorado, supra.*

Based on our review of the record, though the evidence is conflicting, we conclude that there is sufficient evidence from which the jury could determine that Chambers and the Conference each entered into a fiduciary relationship with Winkler and that Chambers and the Conference breached their fiduciary duties. Therefore, the trial court did not err in instructing the jury on the fiduciary issue claims.

We reject the Conference's contention that it is immune from liability under §13-21-116, C.R.S. (1987 Repl. Vol. 6A). There is no showing here that the Conference was a volunteer organization or that it accomplished its work through unpaid volunteers. *See Jones v. Westernaires, Inc.,* 876 P.2d 50 (Colo. App. 1993).

## III.

The Conference also contends that Winkler's action is barred by the applicable statute of limitations. In particular, the Conference asserts the trial court erred by not instructing the jury to determine on what date Winkler's claims of negligent hiring or supervision accrued and that the Conference was not responsible for any alleged negligent supervision that occurred prior to January 22, 1991, two years before Winkler filed this action. We disagree.

A cause of action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. Section 13-80-108(1), C.R.S. (1995 Cum. Supp.); *Mastro v. Brodie,* 682 P.2d 1162 (Colo. 1984).

The time when a plaintiff discovered, or through the use of reasonable diligence should have discovered, the negligent conduct is normally a question of fact which must be resolved by the trier of fact, in this case a jury. However, if the undisputed facts clearly show that a plaintiff discovered, or reasonably should have discovered, the negligent conduct as of a particular date, the issue may be decided as a matter of law.

The critical inquiry of when an action accrues is knowledge of the facts essential to the cause of action, not knowledge of the legal theory upon which the action may be brought. *Morris v. Geer,* 720 P.2d 994 (Colo. App. 1986).

Here, Winkler did not know, nor could she be expected to discover, the factual basis for her claims of negligent hiring or supervision until January 1992, when the storeroom incident occurred and Winkler first learned that at least one other woman had similar experiences with Chambers and that the church authorities had been so informed. January 1992 was well within the applicable two-year statute of limitations.

Conversely, we note that the Conference had a continuing duty to supervise Chambers and became liable for his actions when it knew or should have known that his conduct would subject a third party to an unreasonable risk of harm. *See Destefano v. Grabrian, supra.*

Therefore, we conclude that the trial court did not err by not submitting the issue of the date of accrual to the jury.

We also reject the Conference's related argument, based on *Cassidy v. Smith,* 817 P.2d 555 (Colo. App. 1991), that if the trial court had determined that each incident created a new claim, the jury should have been instructed that the Conference was not responsible for any alleged negligent supervision occurring prior to January 22, 1991. Because we have concluded that Winkler's claim against the Conference for negligent hiring or supervision accrued within the applicable statute of limitations, such an instruction was not appropriate.

## IV.

The Conference next contends the trial court erred in failing to instruct the jury that it could consider whether Winkler assumed the risk of Chambers' tortious conduct. In addition, the Conference and Chambers contend the jury should have been

instructed on the affirmative defense that Winkler failed to mitigate or minimize her damages. Chambers also argues that the jury should have been instructed on comparative negligence principles with regard to Winkler's claims against him. We find no merit in these contentions.

The premise for the Conference's argument that an assumption of the risk instruction was appropriate is that, after the first incident, Winkler knew that when she was alone at church with Chambers he would act improperly towards her. We conclude that this premise is flawed.

**A.**

An instruction based on assumption of risk may be appropriate with regard to claims for which comparative negligence principles are applicable. *See CJI-Civ. 3d* 9:4 (1988) (Notes on Use) (assumption of risk instruction should be given only in comparative negligence cases governed by statute). Comparative negligence is applicable only if there is evidence that would support a finding that both parties are at fault. *See DeBose v. Bear Valley Church of Christ, supra.*

Even if we assume that comparative negligence principles may apply to a claim for breach of fiduciary duty or negligent supervision or hiring, an issue not addressed by the parties, we conclude that there is no evidence which would support a finding that Winkler was at fault or had knowledge of the danger to which she was exposed, consented to that danger, and assumed the risk. *See Carter v. Lovelace,* 844 P.2d 1288 (Colo. App. 1992). There is no indication that Winkler's continued contact with Chambers, especially in a counseling relationship, established either fault, consent to a known danger, or assumption of the risk.

Further, the record indicates that Winkler was vulnerable because of her mental state and that, unless she completely abstained from going to church, contact with Chambers was inevitable. Thus, under such circumstances, we conclude that an

assumption of the risk instruction was not supported by the record.

The jury was instructed that it could consider Winkler's comparative negligence with respect to her negligent hiring and supervision claim against the Conference. Without addressing the appropriateness of the instruction, we conclude that the issue of assumption of risk was subsumed in the instructions that were given to the jury. *See Howard v. Wood Bros. Homes, Inc.*, 835 P.2d 556 (Colo. App. 1992), *rev'd in part on other grounds*, 862 P.2d 925 (Colo. 1993).

In light of our previous conclusions, we also conclude that the trial court did not err in failing to instruct the jury on comparative negligence with regard to Winkler's claim for breach of fiduciary duty and outrageous conduct against Chambers. Moreover, Chambers, in effect, by arguing that his actions amounted to battery, admitted that his conduct was intentional. See *CJI-Civ. 3d* 20:5 (1989). Accordingly, on that basis, a comparative negligence instruction would not have been appropriate. *See Carman v. Heber*, 43 Colo. App. 5, 601 P.2d 646 (1979) (comparative negligence statute inapplicable to claims based on intentional conduct); *see also* Restatement (Second) of Torts §481 (1965).

B.

The Conference and Chambers also submitted instructions which provided, respectively, that Winkler had a duty to mitigate her damages (1) by reporting Chambers' offensive conduct to church authorities earlier as a reasonable person would have done under similar circumstances and (2) by continuing to have contact with Chambers without requesting that he stop the offensive conduct. In light of our determination that instructions based on assumption of the risk and comparative negligence were not appropriate, the trial court did not err in refusing to submit the tendered instructions on failure to mitigate damages to the jury.

Moreover, the jury was instructed that it could consider whether Winkler failed to mitigate damages by not promptly obtaining appropriate therapeutic or medical care. We conclude that this instruction adequately set forth the extent of Winkler's duty to mitigate or minimize her damages in this case.

V.

Relying on *Rigazio v. Archdiocese of Louisville,* 853 S.W.2d 295 (Ky. App. 1993), Chambers asserts that the trial court erred in instructing the jury on outrageous conduct rather than on the more "traditional" and "well-recognized" tort of battery. In this regard, Chambers argues that the tort of outrageous conduct cannot lie to redress conduct constituting battery. Chambers further asserts that characterizing conduct amounting to battery as outrageous conduct should not extend the statute of limitations. We disagree with both assertions.

A.

Chambers' first argument ignores the history of the tort of outrageous conduct in Colorado. Our supreme court first recognized the tort in *Rugg v. McCarty,* 173 Colo. 170, 177, 476 P.2d 753, 756 (1970), in which it stated that to be actionable, the conduct for which redress is sought must be "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Outrageous conduct is an independent tort which, if proved, entitles the plaintiff to compensatory damages. *Churchey v. Adolph Coors Co.,* 759 P.2d 1336 (Colo. 1988). The theories of outrageous conduct and battery overlap, and depending on the facts of the case, they may coexist, or either may exist without the other. *See Enright v. Groves,* 39 Colo. App. 39, 560 P.2d 851 (1977) (actions of a police officer in arresting a woman supported separate claims for battery and outrageous conduct). Moreover, we note that our supreme court has recognized the

tort of outrageous conduct as an appropriate cause of action in a suit involving the misconduct of a clergyman. *See Destefano v. Grabrian, supra.*

**B.**

Since outrageous conduct is a separate tort which may be premised on conduct amounting to a battery, it follows that an action with respect thereto is not barred by the statute of limitations relating to battery.

Actions based on battery are barred one year after both the injury and the cause are known or should have been known by the exercise of reasonable diligence. Sections 13-80-103(1)(a), C.R.S. (1987 Repl. Vol. 6A) and 13-80-108(1). The limitation period applicable to outrageous conduct is two years from the date of accrual. Sections 13-80-102(1)(a), C.R.S. (1995 Cum. Supp.) and 13-80-108(1). The storeroom incident occurred in early January 1992, and Winkler commenced this action on January 22, 1993, presumably more than one year later.

In addition, in those instances in which a claim may be pursued on two theories having different limitations on actions, the longer limitation applies. *Jones v. Cox*, 828 P.2d 218 (Colo. 1992). Thus, the outrageous conduct claim, having been filed within two years of the storeroom incident, was timely.

Hence, the trial court did not err in instructing the jury on Winkler's claim of outrageous conduct, nor was the action barred by the statute of limitations relating to battery.

**VI.**

Chambers next contends that the trial court erred in admitting testimony from other women who testified that he engaged in similar misconduct with them. We disagree.

Similar transaction evidence, while more commonly proffered in criminal cases, may be utilized in civil cases if it is

relevant to the issues. *See Munson v. Boettcher & Co.,* 832 P.2d 967 (Colo. App. 1991), *aff'd*, 854 P.2d 199 (Colo. 1993). Such evidence may be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." CRE 404(b). To be admissible, it must satisfy the four-part test set forth in *People v. Spoto,* 795 P.2d 1314 (Colo. 1990). *See also DeBose v. Bear Valley Church of Christ, supra.*

Here, the other women testified that Chambers engaged in inappropriate touching and made unwanted verbal comments to them. Thus, the testimony met the threshold requirement of similarity.

We further conclude that the evidence was admissible under *People v. Spoto, supra.* The evidence related to a material issue of fact, *i.e.,* whether Chambers' conduct towards Winkler was intentional and with improper motive, or accidental. It was logically relevant because the other incidents tended to negate Chambers' argument that the touching was accidental and that his comments were not inappropriate. Thus, the logical relevance of the evidence was independent of the prohibited inference that Chambers had a bad character and acted in conformity with that character. The fact that such an inference may be drawn does not render the evidence inadmissible. Furthermore, we conclude that the trial court did not abuse its discretion in finding that the prejudicial effect of the evidence was outweighed by its probative value. *See People v. SPOTO, supra; DeBose v. Bear Valley Church of Christ, supra.*

## VII.

The Conference next contends that the trial court erred in entering judgment for costs against it based on an offer of settlement (offer of judgment) to multiple defendants that did not apportion the settlement amongst the various defendants. We agree.

In *Taylor v. Clark,* 883 P.2d 569, 571 (Colo. App. 1994), a division of this court held that §13-17-202 does not apply to an

unapportioned offer of settlement made by a defendant to more than one plaintiff, reasoning that:

> The effectiveness of the statute is based on the ability of parties accurately to assess the value of their claims at issue and compare that value with a settlement offer. Such a comparison becomes difficult, however, when a defending party makes a lump sum offer to multiple parties with distinct interests.
>
> Further, since an unapportioned offer can only be accepted by all the offerees acting in unison, an individual offeree cannot independently weigh the benefit of accepting an unspecified portion of the offer against the likelihood of receiving a less favorable judgment. Thus, an unapportioned offer to multiple parties takes away the individual offeree's ability to make a meaningful choice between accepting the offer or continuing with the litigation, and application of the statute under these circumstances does not comport with the policy of encouraging the settlement of lawsuits.

Relying on *Anderson v. Dunton Management Co.*, 865 P.2d 887 (Colo. App. 1993), Winkler argues that because the judgment obtained against the Conference individually, including interest and costs, exceeded the settlement offer to all three defendants, the, statute is applicable. However, we conclude that the reasoning set forth in *Taylor v. Clark, supra,* is dispositive.

Therefore, we conclude that the trial court erred in awarding Winkler costs based on the offer of settlement statute and that the judgment should be reduced by $2,918.58, the amount of that award.

## VIII.

The Conference next contends that the trial court improperly imposed joint and several liability on it for the costs awarded Winkler. We disagree.

Section 13-16-104 provides that a successful plaintiff shall recover his or her costs incurred in an action against a defendant. This section does not expressly provide for, or preclude, a pro rata assignment of costs amongst litigants.

The Conference contends that the imposition of joint and several liability for costs is contrary to principles of tort reform in general and more specifically to the concept of pro rata liability embodied in the doctrine of comparative negligence set out in §§13-21-111 and 13-21-111.5, C.R.S. (1987 Repl. Vol. 6A). The Conference argues that the trial court should have allocated the amount of costs entered against each defendant on a pro rata basis in the same percentage as the jury verdict against each defendant as to the total jury verdict. Thus, on that basis, the Conference would be liable for approximately 65% of the costs.

In *Cobai v. Young,* 679 P.2d 121 (Colo. App. 1984), a division of this court held that a trial court may allocate costs between defendants. *See also* §§13-16-108 and 13-16-109, C.R.S. (1987 Repl. Vol. 6A). This result is essentially what the Conference advocates here. However, the court in *Cobai* implicitly held that the trial court's right to allocate costs between defendants is discretionary.

Because we conclude that, under the circumstances present here, the trial court did not abuse its discretion in making the award of costs against the defendants joint and several, we will not overturn that award on appeal. *See Poole v. Estate of Collins,* 728 P.2d 741 (Colo. App. 1986)

## IX.

Finally, the Conference contends that the trial court erred by failing to advise the jury of the amount of the settlement that Winkler entered into with Grace Church and by failing to offset that amount from the verdict. Under the circumstances here, we disagree.

Here, the Conference chose not to designate Grace Church as a liable non-party because such a designation would have been inconsistent with its defense that neither it nor the church was negligent. In light of that strategic decision, the jury was not permitted to apportion the degree of fault attributable to the settling party. Thus, the trial court did not err in not subtracting the amount of the settlement from the verdict. *See Smith v. Zufelt,* 880 P.2d 1178 (Colo. 1994) (verdict may be reduced only by the cumulative percentage of liability attributable to any settling parties by the jury).

We reject the Conference's argument that the jury should have been instructed in accordance with *Greenemeier v. Spencer,* 719 P.2d 710 (Colo. 1986). That case was decided prior to the present statutory scheme relating to apportionment of damages with designated non-parties and contributions among joint tortfeasors. In any event, the jury was informed that Grace Church had been a party and had settled, but it was not so instructed.

X.

The judgment awarding Winkler $2,918.58 in costs based on an offer of settlement is reversed. The balance of the judgment is affirmed.

JUDGE RULAND and JUDGE ROTHENBERG concur.

**COLORADO COURT OF APPEALS** **November 9, 1995**
**No. 94CA0652**
**No. 94CA0661**

DIANNE R. WINKLER,

*Plaintiff-Appellee,*

*v.*

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, A COLORADO NON-PROFIT CORPORATION, AND GLENN CHAMBERS,

*Defendants-Appellants.*

**Appeal from the District Court**
**of the City and County of Denver**
**Honorable John N. McMullen, Judge**
**No. 93CV378**

**Division V** **JUDGMENT AFFIRMED IN PART**
**Opinion by JUDGE ROY** **AND REVERSED IN PART**
**Ruland and Rothenberg, JJ., concur**

**Opinion Modified, and As Modified,**
**Petitions for Rehearing DENIED**

Holland, Seelen & Pagliuca, Brian K. Holland, Joyce A. Seelen, Denver, Colorado, for Plaintiff-Appellee

Quigley & Bruce, Neil Quigley, Bruce A. Logan, Denver, Colorado, for Defendant-Appellant Rocky Mountain Conference of the United Methodist Church

Keller, Wahlberg & Morrato, P.C., James J. Morrato, Denver, Colorado, for Defendant-Appellant Glenn Chambers

OPINION is modified as follows:

Beginning on page 1, 10 lines from the top of the page, the following addition (shown by overshadowing) is made:

> Chambers served as senior pastor to Grace United Methodist Church by appointment from the Conference from 1979 until he was suspended in April 1992 because of allegations of misconduct. Throughout his employment, Chambers had an alcohol problem dating to 1972 of which the Conference was aware well prior to 1992.

In this consolidated appeal, defendants, Glenn Chambers and Rocky Mountain Conference of the United Methodist Church (Conference), appeal from the judgment entered on jury verdicts in favor of plaintiff, Dianne R. Winkler, based on claims that Chambers and the Conference breached their fiduciary duty to Winkler, that the Conference negligently hired or supervised Chambers, and that Chambers engaged in extreme and outrageous conduct. The Conference also appeals the trial court's awards of costs to Winkler. We affirm in part and reverse in part.

Chambers served as senior pastor to Grace United Methodist Church by appointment from the Conference from 1979 until he was suspended in April 1992 because of allegations of misconduct. Throughout his employment, Chambers had an alcohol problem dating to 1972 of which the Conference was aware well prior to 1992.

In 1980, the Conference was informed of an incident concerning Chambers attributable to the abuse of alcohol. In 1986, a woman associate pastor of Grace Church told a District Superintendent for the Conference that Chambers had inappropriately touched her, but requested no further action as she "would take care of it." In October 1991, a parishioner reported to a Conference pastor alleging inappropriate conduct by Chambers, but did not file a formal complaint. At trial, this parishioner testified that she told the Conference that she did not like the way Chambers spoke to her and the fact that "he always seemed to be around" her when she was at church.

**COURT OF APPEALS OF THE STATE OF COLORADO**

**Case Number: 94CA0652 & 94CA0661**

**Trial Court Number: 93CV378**

**ORDER**

DIANNE R.WINKLER V ROCKY MOUNTAIN CONF., ET AL

Upon consideration of the Petitions for Rehearing filed by the Appellants herein, the Opinion is Modified and as Modified, the Petitions for Rehearing are DENIED. It is ordered that issuance of the Mandate is stayed to and including February 20, 1996 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:
Roy, J.
Ruland, J.
Rothenberg, J.

DATED: January 18, 1996

## APPENDIX B



**SUPREME COURT, STATE OF COLORADO**
**CASE NO. 96SC88**
**CERTIORARI TO THE COLORADO COURT OF APPEALS,**
**94CA0652 & 94CA0661**
**DISTRICT COURT, CITY AND COUNTY OF DENVER,**
**93CV378**

---

**ORDER OF COURT**

---

GLENN CHAMBERS AND
ROCKY MOUNTAIN CONFERENCE OF THE
UNITED METHODIST CHURCH,
A COLORADO NON-PROFIT CORPORATION,

*Petitioners,*

*v.*

DIANNE R. WINKLER,

*Respondent.*

---

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 3, 1996.

cc: James J. Morrato
KELLER, WAHLBERG & MORRATO, P.C.
1050 - 17th Street, #1440
Denver, CO 80265

Neil Quigley
Bruce A. Logan
QUIGLEY & BRUCE
1010 Cherry Tower
950 S. Cherry Street
Denver, CO 80222

Joyce Seelen
HOLLAND, SEELEN & PAGLIUCA
1700 Lincoln, #2530
Denver, CO 80203

Honorable John N. McMullen
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Clerk of the District Court
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

Patrick H. Stanford, Clerk
Colorado Court of Appeals

**COLORADO COURT OF APPEALS** **May 30, 1996**
**No. 94CA1058**
**No. 94CA1183**
**No. 94CA1200**

CHRISTA G. BOHRER,

*Plaintiff-Appellee,*

*v.*

DANIEL DEHART;
FIRST UNITED METHODIST CHURCH OF GREELEY,
A NON-PROFIT COLORADO CORPORATION;
AND ROCKY MOUNTAIN CONFERENCE
OF THE UNITED METHODIST CHURCH,
A NON-PROFIT COLORADO CORPORATION,

*Defendants-Appellants.*

**Appeal from the District Court**
**of the City and County of Denver**
**Honorable Connie L. Peterson, Judge**
**No. 93CV434**

**Division IV** **JUDGMENT AFFIRMED IN PART,**
**Opinion by JUDGE BRIGGS** **REVERSED IN PART,**
**Sternberg, C.J., and** **AND CAUSE REMANDED**
**Marquez, J., concur** **WITH DIRECTIONS**

Holland, Seelen & Pagliuca, Joyce Seelen, Brian K. Holland, Denver, Colorado, for Plaintiff-Appellee

Hibschweiler & Johnson, James D. Johnson, Sheila E. Barthel, Denver, Colorado, for Defendant-Appellant Daniel DeHart

Keller, Wahlberg & Morrato, P.C., James J. Morrato, Denver, Colorado, for Defendant-Appellant First United Methodist Church of Greeley

Quigley & Bruce, William C. Ritter, Neil Quigley, Denver, Colorado, for Defendant-Appellant Rocky Mountain Conference of the United Methodist Church

In this consolidated appeal, defendants Daniel DeHart (DeHart) and Rocky Mountain Conference of the United Methodist Church (Conference) appeal the judgment of the trial court finding them liable to plaintiff, Christa G. Bohrer, on claims arising out of DeHart's sexual abuse of plaintiff while she was a minor. Defendant First United Methodist Church of Greeley (Church), which is a member of the Conference, does not appeal the judgment awarded against it, but appeals the trial court's order imposing on defendants joint and several liability for plaintiff's costs. We affirm the judgment of liability against DeHart on the claims against him for breach of fiduciary duty and outrageous conduct, the judgment of liability against the Conference on the claim against it for negligent hiring and supervision, and the award of costs jointly and severally against all defendants. We reverse the judgment of liability on the claim against the Conference for breach of fiduciary duty, reverse the compensatory and punitive damage awards against DeHart and the Conference, and remand for a new trial to determine the allocation of fault among defendants and the amount of compensatory and punitive damages to be awarded against DeHart and the Conference.

When plaintiff was a twelve-year-old parishioner at the Church, DeHart, its youth minister, encouraged her to discuss with him any problems she had. Though reluctant at first, she eventually began counseling with him and confided in him about her abusive father, her distant mother, and her thoughts of suicide. DeHart, then twenty-eight years old and married, began to pursue a close relationship with the child involving more than counseling and support for her.

DeHart soon confided in plaintiff about his own personal problems, including his marital difficulties. Over the next two years, hugs during counseling sessions led to other increasingly intimate physical touching. Shortly after plaintiff turned fourteen, DeHart convinced plaintiff to submit to a sexual relationship with him. According to plaintiff, DeHart told her, among other things, that she was as bad as she believed when she came to him for counseling but that he loved her despite all of her faults; that their sexual relationship was God's will; and that the

relationship was proper in the eyes of God because they were spiritual husband and wife.

DeHart and plaintiff's sexual relationship lasted four years. Sexual encounters occurred, among other places, on Church youth trips, in DeHart's car, in the Church building, and in plaintiff's home when her parents were out of town. Plaintiff testified that DeHart told her that, if she ever revealed their relationship, she would "go to hell," that she would be punished for having seduced a minister, and that he would divulge everything she had ever told him about her personal life. Virtually all of the sexual conduct, which plaintiff's testimony indicated was frequent and became increasingly degrading for her, occurred before she turned eighteen.

Plaintiff finally managed to end the relationship the summer before she left for college. The emotional and physical repercussions she had been experiencing nevertheless continued.

After two years of therapy, plaintiff confronted DeHart, hoping he would acknowledge the harm he had caused her. He instead told her he saw nothing wrong with what they had done. She then called and wrote to Conference officials about the relationship, stating she felt she had a moral obligation to see that the same thing did not happen to others. She asked that the Conference keep the information as confidential as possible because she had not yet revealed the relationship to her parents or other members of the congregation.

The following month, Conference officials confronted DeHart with plaintiff's allegations. While he denied any sexual relationship, he agreed to surrender his credentials "under complaint." The Conference accepted the surrender and determined that no further investigation or hearings were warranted. Plaintiff also contacted local authorities, which led to criminal charges being filed against DeHart. The charges resulted in a conviction and sentence pursuant to a plea bargain that involved work release on one charge, probation on another, and no immediate restitution. Plaintiff testified that when she expressed her disappointment with the result, the male prosecutor, who had

replaced the initial female prosecutor, had explained it wasn't like DeHart had stolen anything from her, like a horse.

Dissatisfied with the actions taken, plaintiff sued DeHart, the Church, and the Conference. The jury awarded plaintiff $187,500 compensatory damages against DeHart on claims of breach of fiduciary duty and outrageous conduct and an equal amount in punitive damages. It awarded her $37,500 compensatory damages against the Church on a claim of negligent hiring and supervision. Finally, the jury awarded plaintiff $150,000 compensatory damages against the Conference on claims of negligent hiring and supervision and breach of fiduciary duty and an equal amount in punitive damages.

I.

DeHart contends that the trial court erred in denying his motions for summary judgment and directed verdict on plaintiff's claim of outrageous conduct and that, even if the claim were properly permitted, the trial court erred in its instructions regarding the claim. We find no error in the submission of the claim or the instructions concerning it.

A.

DeHart first asserts that the claim against him for outrageous conduct was based on conduct amounting to assault and battery. He argues that, because the statute of limitations on a claim for assault and battery had run, plaintiff's claim for outrageous conduct was barred or, if not barred, could not include consideration of conduct amounting to assault and battery. We do not agree.

The elements of a claim for outrageous conduct differ from those for a claim of assault and battery. The elements of assault are that: (1) the defendant acted either with the intent of making a contact with the person of the plaintiff or with the intent of putting the plaintiff in apprehension of such a contact; (2) the plaintiff was placed in apprehension of an imminent contact with his or her person by the conduct of the defendant; and (3) such

contact was or appeared to be harmful or offensive. *CJI-Civ. 3d* 20:1 (1989). The elements of battery are similar, except that the contact must have actually resulted. *See CJI-Civ. 3d 20:5* (1989).

In contrast, to succeed on a claim for outrageous conduct, a plaintiff must prove by a preponderance of the evidence that the defendant, by conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community, intentionally caused severe emotional distress. *See Rugg v. McCarty,* 173 Colo. 170, 476 P.2d 753 (1970).

Depending on the facts of the case, a claim for outrageous, conduct may overlap with a claim for assault and battery. The claims may coexist or either claim may exist without the other. Hence, in this case, even if the statute of limitations on an assault and battery claim had run, plaintiff still had the right to sue on the separate and still viable claim of outrageous conduct and to have the jury consider all of DeHart's conduct, including that constituting assault and battery. *See Winkler v. Rocky Mountain Conference of United Methodist Church,* P.2d (Colo. App. Nos. 94CA0652 & 94CA0661, November 9, 1995); *Enright v. Groves,* 39 Colo. App. 39, 560 P.2d 851 (1977).

B.

DeHart asserts that plaintiff portrayed his conduct as sexual battery throughout the course of voluminous discovery and in pre-trial motions. He argues that plaintiff was therefore precluded by the doctrine of judicial estoppel from pursuing and presenting to the jury claims for outrageous conduct and breach of fiduciary duty. We again disagree.

The doctrine of judicial estoppel applies only when there has been judicial acceptance of a contradictory position by a party in an earlier proceeding. *See Lyons Savings & Loan Ass'n v. Dire's Lock & Key Co.,* 885 P.2d 345 (Colo. App. 1994). DeHart has made no such assertion, and the record reveals no such judicial ruling.

II.

DeHart contends that for several reasons the trial court erred in submitting to the jury the claim against him for breach of fiduciary duty. We again disagree.

A.

DeHart asserts, in an argument similar to that presented regarding the outrageous conduct claim, that conduct amounting to assault and battery is not actionable by a claim for breach of fiduciary duty. We reject the contention for similar reasons. *See Destefano v. Grabrian,* 763 P.2d 275 (Colo. 1988); *Winkler v. Rocky Mountain Conference of United Methodist Church, supra; DeBose v. Bear Valley Church of Christ,* 890 P.2d 214 (Colo. App. 1994)(*cert. granted* June 19, 1995).

B.

DeHart next asserts that he could not breach any fiduciary duty to plaintiff because a fiduciary duty arises only when one exerts control over the financial affairs of another. However, in *Moses v. Diocese of Colorado,* 863 P.2d 310 (Colo. 1993), the supreme court held that the clergy-parishioner relationship may be fiduciary in nature; that one of the fiduciary's duties is to act with utmost good faith and solely or primarily for the benefit of the dependent party; and that the existence of such a relationship is a question of fact for the jury. The holding in *Moses* is dispositive of DeHart's assertion.

C.

DeHart finally asserts in regard to the claim of breach of fiduciary duty that the trial court erred in refusing to instruct the jury that only conduct occurring during the pastoral counseling relationship was actionable. He relies on the fact that in 1985 he resigned as a minister at the Church to pursue academic studies. We conclude that the trial court correctly refused the instruction.

DeHart's argument ignores that he continued to be involved in the youth programs at the Church after his resignation as a minister with the Church and that the jury could conclude from the evidence presented that DeHart never formally terminated the counseling relationship with plaintiff. More importantly, the argument improperly assumes that any duty an adult counselor has to avoid harming a child being counseled necessarily ends immediately when formal counseling ceases.

The supreme court in *Moses* recognized that a parishioner may develop a deep emotional dependence on his or her minister. The intensity of the emotions results in part from the process of "transference and is a typical reaction characterized by a patient unconsciously attributing repressed feelings to the counselor. Transference is one of the most significant concepts in therapy." *Moses v. Diocese of Colorado, supra,* at 328.

As one expert further explained in this case, that dependence leaves the parishioner vulnerable to manipulation because of the resulting "power imbalance." The person in the position of trust can maintain or increase the power imbalance within the distorted reality of the "closed setting" that has evolved and thus continue to take advantage of the parishioner's vulnerability beyond the formal counseling relationship.

DeHart's argument, in effect, is that his own continuing conduct after any formal counseling relationship ended was the legal equivalent of an intervening cause of at least part of plaintiff's damages. That argument cannot succeed when the continuing conduct results from a continuation of the power imbalance created in the fiduciary relationship, and the harm is reasonably foreseeable. *See generally* W. Prosser & R. Keeton, *Prosser and Keeton on Torts* §44 at 301, 303 (5th ed. 1984)("On its face, the problem is one of whether the defendant is to be held liable for an injury to which the defendant has in fact made a substantial contribution, when it is brought about by a later cause of independent origin, for which the defendant is not responsible. In its essence, however, it becomes again a question of the extent of the defendant's original obligation; and once more the problem is not primarily one of causation at all, since it does not arise

until cause in fact is established. It is rather one of the policy as to imposing legal responsibility .... In all of these cases there is an intervening cause combining with the defendant's conduct to produce the result, and in each case the defendant's negligence consists in failure to protect the plaintiff against that very risk.").

Here, DeHart took advantage of his position of trust to abuse plaintiff sexually and emotionally within a cloak of secrecy and, even though the formal counseling relationship may not have continued, he continued the sexual and other abuse of plaintiff without interruption for the rest of her childhood. At least in these circumstances, we find no error in the trial court's refusal to give the requested instruction. *See generally* §12-43-704(l)(q), C.R.S. (1991 Repl. Vol. 5B)(person practicing psychotherapy subject to discipline for engaging in sexual contact with a client during the therapeutic relationship and "for up to six months after the period in which such a relationship exists"); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* Standard 4.07 (1992)("(a) Psychologists do not engage in sexual intimacies with a former therapy patient or client for at least two years after cessation or termination of professional services. (b) Because sexual intimacies with a former therapy patient or client are so frequently harmful to the patient or client, and because such intimacies undermine public confidence in the psychology profession and thereby deter the public's use of needed services, psychologists do not engage in sexual intimacies with former therapy patients and clients even after a two-year interval except in the most unusual circumstances...."); E. Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions,* 19 Fla. St. U. L. Rev. 499 (1991).

III.

DeHart claims that the trial court's submission of the outrageous conduct and breach of fiduciary claims against him to the jury was violative of the Establishment Clause of the First Amendment. However, the supreme court held in *Moses v. Diocese of Colorado, supra,* and *Destefano v. Grabrian, supra,* that

claims such as these are actionable at least when, as here, the defendant does not claim the conduct was religiously motivated.

The Conference similarly contends that submission to the jury of the negligent hiring and supervision and breach of fiduciary duty claims against it was violative of the Establishment Clause. The holdings in *Moses v. Diocese of Colorado, supra,* and *Destefano v. Grabrian, supra,* are equally dispositive of this contention. *See Winkler v. Rocky Mountain Conference of Methodist Church, supra.*

IV.

DeHart and the Conference assert that the trial court erred when it refused to give an instruction on comparative fault or otherwise submit the defense of consent to the jury. We are not persuaded.

Defendants' assertion is premised on the assumption that a child is capable of giving the kind of consent the law should recognize to a sexual relationship with an adult religious counselor. However, a child is in no position to exercise independent judgment and evaluate on an equal basis the consequences of such a relationship. For a child induced to give such "consent," harm is not only still inflicted, it may be exacerbated. *See generally* E. Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions, supra,* at 507-08 (common manifestations of the harm suffered by clients exploited by their religious counselors include "diminished self esteem, increased feelings of personal ambivalence, increased sexual difficulties, anger at being exploited, a feeling of being used as a sex object . . . an inability to trust other therapists . . . anxiety and depression [that] sometimes lead to hospitalization and suicide attempts. . . . a spiritual crisis . . . reputations [that] are shredded . . . [loss of jobs] and sometimes their entire lives in the community. These are not the usual results of a romantic relationship between two 'consenting adults.'").

Defendants argue that the jury should have been able to consider as comparative fault plaintiff's consent at least in the

later years of the relationship as plaintiff matured. The argument is similar to the argument that the jury should not be allowed to award damages for conduct occurring after the counseling relationship formally ended. It ignores that dependence, transference, and the resulting vulnerability do not cease merely because a child physically matures while sexual abuse in secrecy by an adult in a position of trust continues unabated. *Cf. Cassidy v. Smith,* 817 P.2d 555 (Colo. App. 1991)(Dubofsky, J., dissenting). It also ignores that, regardless of plaintiff's physical maturation, virtually all the sexual conduct occurred before plaintiff reached the age of majority.

The General Assembly has determined that consent is not a defense to a criminal charge of sexual assault on a child less than eighteen years of age by one in a position of trust. *See* §§18-3-405.3 & 18-3-408.5, C.R.S. (1995 Cum. Supp.). Nor is it a defense to a criminal charge of sexual assault by a psychotherapist upon a patient. *See* §18-3-405.5, C.R.S. (1995 Cum. Supp.) We likewise decline to allow the defense, at least in the circumstances presented here. *Cf. Cassidy v. Smith, supra* (statute of limitations on claim of sexual abuse of a child does not begin to run until the child reaches the age of majority).

The trial court therefore did not err in refusing to instruct the jury on comparative fault or consent. *See* E. Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions, supra* (positing that, because of the power imbalance, consent should not be available as a defense in a civil cause of action for injuries caused by sexual contact with a religious counselor); *see also University of Denver v. Whitlock,* 744 P.2d 54 (Colo. 1987)(if no duty of care is owed, no liability can be imposed); *cf. Simmons v. United States,* 805 F.2d 1363 (9th Cir. 1986)(upholding finding that statute of limitations had not run because transference and dependence made it difficult for the plaintiff to believe that anything the therapist had done had caused her emotional damage, instead blaming herself); *Bever v. First National Bank,* 843 P.2d 53 (Colo. App. 1992). *But see Robinson v. Roberts,* 423 S.E.2d 17 (Ga. App. 1992).

V.

The Conference and DeHart contend that the trial court abused its discretion in denying their motion for continuance after they were unable to locate an expert witness. We do not agree.

In deciding whether to grant a motion for continuance, the trial court should consider the circumstances of the particular case, weighing the right of the party requesting the continuance to a fair hearing against the prejudice that may result from the delay. Its decision is discretionary and will not be set aside on appeal absent an abuse of that discretion. *Butler v. Farner,* 704 P.2d 853 (Colo. 1985).

Here, plaintiff had endorsed a psychiatrist as an expert in June of 1993. After retaining their own expert, defendants requested that plaintiff submit to an examination in November. However, in a letter dated December 1, 1993, defendants asked plaintiff to stipulate to an extension in the time for the examination and in the deadline of December 24 for them to disclose the expert's findings and conclusions.

When plaintiff refused because of concern for preserving the trial date, defendants rescheduled the examination for December 24, 1993. After the examination, defendants sent plaintiff a copy of the expert's report with a letter dated December 31, 1993. However, defendants did not endorse the expert until January 14, 1994, twenty-one days after the C.R.C.P. 16 deadline. Defendants attempted to communicate with the expert through a letter dated January 19 but received no response.

On February 11, 1994, over plaintiff's objection, the court permitted the expert's late endorsement but required that defendants make the expert available for a deposition. However, defendants had been out of contact with the expert since January 6, 1994, and were unable to produce the expert for a deposition that had been scheduled for February 24, 1994. On March 1, 1994, thirteen days before the trial date, defendants filed their motion for continuance, indicating that the expert had disconnected her telephone and abandoned her office.

In ruling on defendants' motion, the trial court recognized that there had been some diligence by defendants, but it had already tried imposing a sanction less severe than exclusion for late endorsement of the witness. The court noted that defendants had selected the expert and then had insisted on retaining the expert, resulting in the late endorsement. The court further noted that the expert's report did not seem to be based on reasonable probabilities or professional standards but rather was a narrative of the expert's personal views, raising a question as to what actual value the expert might be to defendants at trial. Against the possible impact on defendants, the court weighed plaintiff's interest in finally resolving the case and avoiding the emotional and financial costs that would result from a continuance.

The issue is not how we might have ruled on the motion. Rather, defendants must demonstrate that the trial court's ruling was manifestly arbitrary, unreasonable, or unfair. *See Hock v. New York Life Insurance Co.*, 876 P.2d 1242 (Colo. 1994).

The court properly weighed the prejudice to all parties before it denied the motion. Defendants had the information in the expert's report available for their cross-examinations at trial. They have not demonstrated any specific prejudice resulting from the court's ruling. In these circumstances, we cannot say the trial court abused its discretion in denying defendants' motion for a continuance. *See generally Butler v. Farner, supra.*

VI.

The Church contends that the trial court abused its discretion in awarding plaintiff's costs against the three defendants jointly and severally rather than apportioning those costs among defendants "on a fair and reasonable basis." We perceive no abuse of discretion.

Section 13-16-104, C.R.S. (1987 Repl. Vol. 6A) provides that a plaintiff recovering for a wrong immediately personal to him or her shall recover costs. While the imposition of costs in such circumstances is required by this statute, the apportionment

of costs among multiple defendants is not so prescribed. Thus, even though damages are apportioned pursuant to §13-21-111.5, C.R.S. (1987 Repl. Vol. 6A), the award of costs remains in the discretion of the trial court. *See Winkler v. Rocky Mountain Conference of United Methodist Church, supra; see also Poole v. Estate of Collins,* 728 P.2d 741 (Colo. App. 1986).

The trial court's imposition of joint and several liability for costs furthers the intent of §13-16-104 that plaintiff recover her costs. Furthermore, a rule requiring that costs be apportioned based on fault would ignore that a plaintiff does not necessarily incur costs in direct proportion to the fault ultimately allocated by the jury among multiple defendants.

We also note that the Church has failed to address whether it may seek to recover from the other defendants, through an action for contribution, any costs it pays to plaintiff in excess of its proportionate share. See §13-50.5-104, C.R.S. (1987 Repl. Vol. 6A); *National Farmers Union Property & Casualty Co. v. Frackleton,* 662 P.2d 1056 (Colo. 1983); *see also Graber v. Westaway,* 809 P-2d 1126 (Colo. App. 1991).

Finally, we note that had the other defendants not been sued by plaintiff, and the Church had then designated them as nonparties at fault pursuant to §13-21-111.5, the Church would have been liable for the entire amount of costs, regardless of the proportion of fault allocated by the jury to the designated nonparties. The Church has not demonstrated why such an award of costs should be permitted but not the award here.

For these reasons, we perceive no abuse of discretion in the trial court's ruling. *See Winkler v. Rocky Mountain Conference of United Methodist Church, supra.*

## VII.

The Conference contends the trial court erred in denying its motion for a directed verdict on the claim against it for breach of fiduciary duty. Based on the evidence in the record, we agree.

A directed verdict may properly be granted when the evidence, viewed in the light most favorable to the plaintiff, is insufficient to support a verdict in his or her favor on that claim. The test on review is whether reasonable persons could draw different conclusions from the evidence presented. *See Moore v. Georgeson,* 679 P.2d 1099 (Colo. App. 1983).

Critical here is the distinction between a claim for clergy malpractice, which because of the constraints of the First Amendment the courts may not entertain, and a claim for breach of fiduciary duty, which may properly be brought to the extent that the alleged wrongdoing falls outside the beliefs and doctrine of the religion. *See Moses v. Diocese of Colorado, supra; Destefano v. Grabrian, supra.*

An unequal relationship does not automatically create a fiduciary duty. In order to be liable the superior party must assume a duty to act with utmost good faith and solely or primarily for the benefit of the dependent party. *Moses v. Diocese of Colorado, supra.*

In this case, plaintiff has directed us to no evidence, and we can find none, suggesting that the Conference ever assumed a duty to act solely or primarily in the best interests of plaintiff in its investigation and resolution of her complaint. Unlike the church officials in *Moses v. Diocese of Colorado, supra,* no bishop or other representative of the Conference ever asked plaintiff to refrain from discussing the matter with anyone or asked plaintiff to let the Conference alone supervise whatever needed to happen on her behalf. *See generally United Fire & Casualty Co. v. Nissan Motor Corp.,* 164 Colo. 42, 433 P.2d 769 (1967); *First National Bank v. Collins,* 44 Colo. App. 228, 616 P.2d 154 (1980)(no fiduciary duty could exist if neither the nature of relationship nor conduct would have induced the plaintiff to relax the care and vigilance that would and should have ordinarily been exercised in dealing with a stranger). Indeed, plaintiff had previously sought and obtained support and counseling from others, which continued during and after her contact with the Conference, and her contact with local authorities led to criminal charges against DeHart.

Plaintiff argues that the jury properly could have found that a representative of the Conference lied in telling her that once DeHart surrendered his credentials under protest nothing further remained to be done to effect the termination of his ministry and that no authority existed to conduct any further investigation. She asserts that she suffered substantial harm because the Conference, in violation of its own Book of Discipline, failed to take further action to investigate plaintiff's complaint and fulfill its responsibilities to her. As described by a bishop in his testimony, these included the processes of "restoration" and "reconciliation."

However, the alleged wrongdoing results from expectations created by the beliefs and doctrine of the religion. Resolution of the claim would require that the courts become embroiled in a religious dispute requiring the interpretation and weighing of that doctrine. The First Amendment requires that we abstain from doing so and thus precludes an award of damages on such a basis. *See Moses v. Diocese of Colorado, supra; Destefano v. Grabrian, supra; DeBose v. Bear Valley Church of Christ, supra; cf. Van Osdol v. Vogt,* 908 P.2d 1122 (Colo. 1996).

The trial court therefore erred in denying the Conference's motion for a directed verdict on the claim against it of breach of fiduciary duty.

## VIII.

DeHart and the Conference contend that the trial court committed reversible error in submitting to the jury verdict forms which did not meaningfully separate damages resulting from DeHart's conduct from those resulting from the Conference's response to plaintiff's complaint. They contend the court further erred in not requiring the jury to allocate liability among defendants for the injuries caused by DeHart's conduct. We agree the verdict forms were deficient.

Here, the trial court submitted to the jury two special verdict forms for each defendant. One was to be used if the jury found for defendant. The other was for use upon a finding of

liability and provided blank spaces for an award to plaintiff against the particular defendant for past and future damages, as well as punitive damages. None of the forms required the jury to allocate liability based on fault for injuries resulting from DeHart's conduct or to separate those damages from any separate damages resulting from the response by the Conference to plaintiff's complaint.

In his challenge to the verdict forms at trial, DeHart argued that, as long as the consequences to plaintiff for breach of fiduciary duty, outrageous conduct, and negligent hiring and supervision were the same, the damages recoverable under those different legal theories were the same. Hence, he argued that the jury should make a single determination of the amount of damages, if any, caused by plaintiff's relationship with DeHart and then, pursuant to §13-21-111.5, C.R.S. (1987 Repl. Vol. 6A) the jury should allocate fault among the three defendants for the damages resulting from the relationship. He further argued that, because only the Conference should be held liable for damages caused by its response to plaintiff's complaint to it, the jury should separately determine those damages.

In rejecting DeHart's arguments, the trial court in this case did not have the benefit of the analysis of these issues set forth in *DeBose v. Bear Valley Church of Christ, supra.* A division of this court in *DeBose* concluded that when an employer's negligent hiring or supervision of an employee did not result in any additional harm to the plaintiff beyond that caused by the employee, awards of separate damages against the employer and employee can result in the duplication of damages. Even though the jury in *DeBose* had been instructed not to assess damages under one theory of recovery they had assessed under another, it had been provided no instructional guidance as to the manner in which it was to divide the total damages suffered by the minor among his various claims.

Because the verdict form in *DeBose* had not provided for the jury, on the one hand, to make one award of damages for any single, indivisible injury and to apportion those damages pursuant to §13-21-111.5(2), C.R.S. (1987 Repl. Vol. 6A) based on

fault, and, on the other hand, to make a separate award of damages for any separate injury only against the defendants responsible for those damages, the court there concluded that the awards for compensatory damages had to be set aside. And, because the compensatory damages had to be set aside, the judgment for exemplary damages also had to be reversed. The court concluded: "Upon retrial, any verdict assessing the minor's actual damages should be limited to a single amount, apportioned under §13-21-111.5(2), unless the evidence would allow a determination that the minor suffered a separate injury from the actions of each of the . . . defendants." *DeBose v. Bear Valley Church of Christ, supra,* 890 P.2d at 224.

Here, we cannot assume that the amounts awarded by the jury against the separate defendants are for separate injuries or that they are the equivalent of an apportionment based on fault. The jury was not instructed to divide damages based on fault for a single, indivisible injury. Further, the verdict form for the Conference provided for a single award against it on the claims for negligent hiring and supervision and breach of fiduciary duty. We therefore cannot determine to what extent, if any, the award against the Conference is for any separate injury caused by its own conduct after plaintiff submitted to it her complaint against DeHart, as distinct from the injury caused by DeHart's conduct for which, to the extent the injury is the same, the Conference and the Church share liability because of their negligent hiring and supervision.

We agree with the analysis set forth in *DeBose.* It is therefore necessary to reverse the compensatory and punitive damage awards against both DeHart and the Conference.

However, we find no reason to reverse the judgments of liability against DeHart for breach of fiduciary duty and outrageous conduct and against the Conference for negligent hiring and supervision. Rather, only the damage awards against them must be reversed.

A separate problem then arises. Here, unlike in *DeBose,* there are three defendants, only two of which have appealed the judgments entered against them. No party has appealed the

judgment entered against the Church for $37,500 in compensatory damages. Hence, while the jury on retrial must include the Church in any allocation of fault so that on remand the damage award against the other two defendants may be properly calculated, the Church cannot be liable for any amount other than the judgment already entered. It should therefore be treated on retrial as a designated nonparty at fault pursuant to §13-21-111.5(3)(a), C.R.S. (1987 Repl. Vol. 6A).

The judgment of liability against DeHart on the claims for breach of fiduciary duty and outrageous conduct, the judgment of liability against the Conference on the claim for negligent hiring and supervision, and the award of costs jointly and severally against all defendants are affirmed. The judgment of liability on the claim against the Conference for breach of fiduciary duty is reversed. The compensatory and punitive damage awards against DeHart and the Conference are also reversed, and the cause is remanded for a new trial to allocate fault among defendants and determine compensatory and punitive damages to be awarded against DeHart and the Conference, consistent with the views expressed in this opinion.

CHIEF JUDGE STERNBERG and JUDGE MARQUEZ concur.

**COLORADO COURT OF APPEALS** **May 30, 1996**
**No. 94CA1058**
**No. 94CA1183**
**No. 94CA1200**

CHRISTA G. BOHRER,
*Plaintiff-Appellee,*
*v.*
DANIEL DEHART;
FIRST UNITED METHODIST CHURCH OF GREELEY,
A NON-PROFIT COLORADO CORPORATION;
AND ROCKY MOUNTAIN CONFERENCE
OF THE UNITED METHODIST CHURCH,
A NON-PROFIT COLORADO CORPORATION,
*Defendants-Appellants.*

**Appeal from the District Court**
**of the City and County of Denver**
**Honorable Connie L. Peterson, Judge**
**No. 93CV434**

**Division IV** **JUDGMENT AFFIRMED IN PART,**
**Opinion by JUDGE BRIGGS** **REVERSED IN PART,**
**Sternberg, C.J., and** **AND CAUSE REMANDED**
**Marquez, J., concur** **WITH DIRECTIONS**

**Opinion Modified, and As Modified,**
**Petitions for Rehearing DENIED**

Holland, Seelen & Pagliuca, Joyce Seelen, Brian K. Holland, Denver, Colorado, for Plaintiff-Appellee

Hibschweiler & Johnson, James D. Johnson, Sheila E. Barthel, Denver, Colorado, for Defendant-Appellant Daniel DeHart

Keller, Wahlberg & Morrato, P.C., James J. Morrato, Denver, Colorado, for Defendant-Appellant First United Methodist Church of Greeley

Quigley & Bruce, William C. Ritter, Neil Quigley, Denver, Colorado, for Defendant-Appellant Rocky Mountain Conference of the United Methodist Church

OPINION is modified as follows:

Beginning on page 1, 10 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by redlining) are made:

> plaintiff's costs. ~~We~~ affirm the judgment against DeHart determining him to be liable to plaintiff for breach of fiduciary duty, outrageous conduct, and punitive damages; the judgment against the Conference determining it to be liable to plaintiff for negligent hiring and supervision; and the award of costs jointly and severally against all defendants. We reverse the judgment against the Conference determining it to be liable to plaintiff for breach of fiduciary duty and for punitive damages, the compensatory damage awards against DeHart and the Conference, and the punitive damage award against DeHart. Finally, we remand the cause for a new trial to determine the allocation of fault among defendants; the amount of compensatory damages to be awarded against DeHart and the Conference; the amount of punitive damages to be awarded against DeHart; and whether to award punitive damages against the Conference and, if so, the amount of that award.

On pages 2 and 3, no changes, text moved to accommodate modifications.

On page 4, 5 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by redlining) are made:

> against the Church on claims of negligent hiring and supervision and breach of fiduciary duty. Finally, the jury . . .

On page 22, 3 lines from the bottom of the page and continuing to the end of the opinion on page 25, the following deletions

(shown by overstriking) and additions (shown by redlining) are made:

> However, we find no reason to reverse the judgments of liability for compensatory and punitive damages against DeHart for breach of fiduciary duty and outrageous conduct and for compensatory damages against the Conference for negligent hiring and supervision. Rather, only the damage awards against them must be reversed, with the jury on retrial to determine the amount of compensatory damages sustained for any single, indivisible injury, to apportion fault among defendants for that injury, and to determine the amount of punitive damages to be awarded against DeHart. *See Murrow v. Whiteley,* 125 Colo. 392, 404, 244 P.2d 657, 663 (1952) (authorizing partial new trial on damages only under test first articulated by the United States Supreme Court. "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice."); *see generally* C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* §2814 (2d ed. 1995); *cf. Bassett v. O'Dell,* 178 Colo. 425, 49B P.2d 1134 (1972).

The judgment of liability for punitive damages against the Conference cannot be similarly sustained. The verdict form for the Conference does not indicate whether the award of punitive damages against it was based on conduct associated with the claim for negligent hiring and supervision, the claim for breach of fiduciary duty, or both claims. Because we have reversed the judgment against the Conference for breach of fiduciary duty, it is necessary to reverse the judgment of liability against it for punitive damages, with the jury on retrial to determine whether plaintiff is entitled to punitive damages against the Conference

based solely on its conduct associated with the claim for negligent hiring and supervision end, if so, the amount of punitive damages to be awarded.

* * *

The judgment of liability against DeHart on the claims for breach of fiduciary duty, outrageous conduct, and punitive damages, the judgment of liability against the Conference on the claim for negligent hiring and supervision, and the award of costs jointly and severally against all defendants are affirmed. The judgment of liability on the claims against the Conference for breach of fiduciary duty and for punitive damages are reversed. The compensatory and punitive damage awards against DeHart and the Conference are also reversed. The cause is remanded for a new trial to allocate fault among defendants, to determine compensatory damages to be awarded against DeHart and the Conference, to determine punitive damages to be awarded against DeHart, and to determine whether and, if so, in what amount, punitive damages should be awarded against the Conference, consistent with the views expressed in this opinion.

Supreme Court, U.S.
FILED
DEC 10 1996
CLERK

(2)

No. 96-888

In The

# Supreme Court of the United States

**October Term, 1996**

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, a Colorado non-profit corporation,

*Petitioners,*

vs.

DIANE WINKLER,

*Respondent.*

**On Petition For Writ of Certiorari**
**To The Court of Appeals of the State of Colorado**
**Case Nos. 94CA652 and 94CA661**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Holland, Seelen & Pagliuca
Joyce A. Seelen*
1700 Lincoln St., Suite 2350
Denver, Colorado 80203
(303) 832-7700

*Counsel of Record *Attorneys for Respondent*

24pp

## QUESTION PRESENTED

Whether a church organization is exempt from tort liability for secular conduct that does not burden the free exercise of religion, and no record evidence indicates that the petitioner's tortious conduct was rooted in any religious belief.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINION BELOW ..... 1

JURISDICTION ..... 1

REASONS FOR DENYING THE PETITION ..... 5

I. This case is not worthy of certiorari review because the Colorado Court of Appeals' holding is consistent with this Court's well-established precedents. ..... 5

A. The Colorado Court of Appeals followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion. ..... 6

B. Because the Methodist Church never presented record evidence concerning how its tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the actual impact of tort liability ..... 13

II. The Religious Freedom Restoration Act, U.S.C., Sec. 2000bb ("RFRA") does not grant immunity to the Conference. ..... 15

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

CASES

*Bohrer v. DeHart*, ___ P.2d ___ (Colo. App. 1996) ..... 10

*Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991) ..... 8

*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993) ..... 8

*Connes v. Molalla Transp. System, Inc.*, 831 P.2d 1316 (Colo. 1992) ..... 9

*DeStefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) ... 10, 11

*Employment Division Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) ..... 8, 15, 16

*Frazee v. Employment Security Dep't*, 489 U.S. 829 (1989) ..... 6

*Hobbie v. Unemployment Appeals Com'n*, 480 U.S. 136 (1987) ..... 6, 7

*Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. 1992) ..... 8

*Jones v. Wolf*, 443 U.S. 595 (1979) ..... 15

*Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) ..... 6

*Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820 (10th Cir. 1988) ..... 7

*Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), cert. denied, ____ U.S. ___, 114 S.Ct. 2153 (1994) ..... 9-12

*Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986) ..... 7

*Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) ..... 15

*Roman Catholic Bishop v. Superior Ct.*, 50 Cal. Rptr. 2d 399 (Cal App. 4 Dist. 1996) ..... 8

*Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) ..... 15

*Sherbert v. Verner*, 374 U.S. 398 (1963) ..... 7

*Thomas v. Review Bd.*, 450 U.S. 707 (1981) ..... 6

*Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996) ..... 10

*Winkler v. Chambers*, ___P.2d ___ (Colo. App. 1995) . 1, 10, 12, 13

*Wisconsin v. Yoder*, 406 U.S. 205 (1972) ..... 6, 7, 15, 16

STATUTES

Religious Freedom Restoration Act, U.S.C., Sec. 2000bb ..... 15, 16

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend I ..... 1, 5, 7, 8, 14, 16

## OPINION BELOW

The opinion of the Colorado Court of Appeals (pet. app. A) affirming a jury verdict in favor of respondent is reported at *Winkler v. Chambers*, ___P.2d ___ (Colo. App. 1995). The Colorado Supreme Court denied Petitions for Certiorari on September 3, 1996. Pet. app. B.

## JURISDICTION

The petitioner invokes the jurisdiction of this Court under 28 U.S.C. Sec. 125(3)

## STATEMENT OFF THE CASE

Respondent, Dianne Winkler, filed suit against the Rocky Mountain Conference of the United Methodist Church ("Conference"), and Rev. Glenn Chambers, a Methodist Minister. Her claims against Chambers included breach of fiduciary duty, and outrageous conduct based on the minister's sexual touching of Winkler that grew out of his counseling of her. Her claims against the Methodist Conference included breach of fiduciary duty, outrageous conduct, and negligent hiring and supervision based on the antecedent knowledge of the Conference that Chambers had sexually approached other vulnerable people and had a longstanding and untreated alcohol problem and on the actions of the Conference subsequent to Winkler's report.

The tortious conduct aggravated a preexisting physical and emotional condition causing Winkler to become ill.

The jury returned verdicts for Winkler of $57,350 against Chambers on the breach of fiduciary duty claim, of $95,853 against the Conference on her negligent hiring and supervision claim and of $10,651 against the Conference on her breach of fiduciary duty claim.

The facts underlying Winkler's claims are recounted in the opinion of the Colorado Court of Appeals, pet. app. A at 2a-4a. Winkler incorporates those facts by reference.

Several sets of facts alleged by the Methodist Conference in its Petition are incorrect: First, the Conference claims at page 16 that the Conference had no prior knowledge of Rev. Chambers' propensity to abuse women before 1992. The Conference ignores the 1972 complaint which involved "another woman", and the 1986 complaint of Rev. Munsey-Nielson, a female associate pastor of Grace Church that Chambers, on occasion, came into her office, touched her inappropriately, and told her to "pucker up." Tr. X: 151. In 1986, Rev. Munsey-Nielson told a District Superintendent for the Conference about concerns expressed to her by other women regarding Chambers' actions toward them. Tr. X: 148-164. In 1990, Chambers approached the wife of junior minister Harold Anderson, who reported it to the local church. Tr. XI: 125, 133. When Conference officials were told directly of Pam Anderson's complaint in 1992, they suggested to Pam Anderson that she withdraw her Complaint against Chambers (Tr. XI: 125) and actively opposed Harold Anderson's support for the women harmed by Chambers. Tr.

XI: 138. At page 5 of its Petition, the Conference acknowledges a 1991 complaint by parishioner Jan Place, but discounts its value because it was not in writing. Place testified that, when she called District Superintendent Margaret Rush Hankins in 1991 to report the abuse by an unnamed clergyman, Rush Hankins guessed, "Are we talking about Glenn Chambers.", to which Place replied, "Yes." Tr. X: 180-181. Carol Klein filed her complaint of abuse in 1992.

Second, the Conference claims at page 7 that the "supervision" by the District Superintendents of ministers is limited to formulating statements of purposes. The evidence at trial showed that the Conference exercised virtually complete control over the annual hiring and supervision of pastors. The Conference, not the individual churches, controlled the 1972, 1980, 1986, 1991 and 1992 complaints about Rev. Chambers. Tr. IX: 46; Tr. X: 86-98, 168; Tr. XI: 77; Tr. XII: 83-89; Tr. XIII: 28. The Conference kept the individual churches uninformed of Chambers' history. The Conference, through District Superintendent Rush Hankins, took control of the 1992 complaints, called the women together in 1992, ostensibly to help the women, and then distorted what the women had told her. Tr. IX: 46; Tr. XII: 231; Tr. XIV: 194-195.

Third, the assertion at page 5 of the Petition that Chambers has, through the present, denied his sexual conduct with any of the women, is inaccurate. Chambers admitted his problem with alcohol and stated that, as a result, he did not remember most of the incidents described by the women who accused him. Pet. app. A, 4a. "As to the incidents he did remember, he stated that any verbal

comments were misunderstood and that the physical contact was incidental." *Id.* Regarding one of the incidental contacts during which Chambers testified he had been drinking, he said, "Ms. Klein wears most often very interesting clothing...She often times wore a T-shirt of some kind that had something written on it...On the particular occasion we're talking about...I couldn't quite read it, and I put my hand forward and smoothed it out to see what was there, and I touched her breast." Tr. XII: 124.[1]

The Colorado Court of Appeals determined that the evidence at trial was sufficient to support Winkler's claims for breach of fiduciary duty and negligence in hiring and supervision. As the Court of Appeals notes at pages 5a and 7a of pet. app. A, neither Chambers nor the Methodist Church asserted at trial that the tortious conduct complained of -- i.e. Chambers' sexual touching of Winkler; the Church's failure to investigate the growing complaints against Chambers subsequent to 1972; the Church's undermining the credibility of the women by telling the congregation that there was nothing in Chambers' history that indicated he had problems; telling the congregation that the women hurt by Chambers were being given counseling, when they were not --was mandated by any religious tenet or belief. Rather, the Methodist Church argued that the First Amendment to the U.S. Constitution prohibits subject matter jurisdiction where clergy hiring and supervision are

---

[1]At page 6, the Conference inappropriately injects significant private information about Winkler, including a diagnosis of herpes that was not caused by Chambers and that is totally irrelevant to the questions addressed to this court.

involved, which argument was rejected by the Court of Appeals.

## REASONS FOR DENYING THE PETITION

### I. This case is not worthy of certiorari review because the Colorado Court of Appeals' holding is consistent with this Court's well-established precedents.

The decision of the Colorado Court of Appeals in this case raises no unsettled issue of federal law. The Colorado court followed well-settled decisions of this Court in holding that laws burdening conduct not proven to be rooted in religious belief do not violate the First Amendment's free exercise clause.

The Methodist Conference cannot argue that the Colorado Court of Appeals ought to have examined evidence concerning the actual impact of tort liability on the Conference's religious belief. Such weighing of evidence in this case is impossible because the Methodist Conference did not present evidence showing whether and how their tortious conduct was required by their specific religious belief. The argument at trial, rather, was much as it is to this Court: Religious organizations should be exempt from tort liability.

### A. The Colorado Court of Appeals followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion.

The Conference has never provided record evidence or even specific allegations showing that its tortious conduct was rooted in any religious belief. Based on this record, the Colorado Court of Appeals applied well-settled law to hold that the judgment in this case did not burden the free exercise of religion. This holding is consistent with every decision by this Court. It also raises no important or unsettled principle of constitutional law. Therefore, this Court should deny the Conference's petition.

This Court has long held that conduct is not "exercise of religion" unless the conduct is mandated by sincerely held religious belief. *See*, e.g. *Frazee v. Employment Security Dep't*, 489 U.S. 829, 834 (1989)(to prove violation of free exercise clause, litigant must show that burdened conduct "was based on a sincerely held religious belief"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)(law does not burden free exercise rights unless it has a "tendency to coerce (Rev. Chambers and the Methodist Church) into acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Com'n*, 480 U.S. 136, 141 (1987)(burdened conduct must be "mandated by religious belief" to be protected by free exercise clause)(quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)("to have

protection of the Religion Clauses, claims must be rooted in religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Under all of this Court's well-established free exercise precedents, the Conference has no defense to tort liability unless the specific tortious acts were actually "mandated by religious belief." *Hobbie*, 480 U.S. at 141. The Methodist Conference has the burden of proving with record evidence that its tortious conduct and religious belief are "inseparable and interdependent." *Yoder*, 406 U.S. at 215.

Moreover, mere assertion that a law burdens some practices that might conceivably be religious has never sufficed to show a violation of the free exercise clause. The party asserting a defense based on the free exercise clause has the burden to show with record evidence that his or her conduct is mandated by a sincere religious belief. *Yoder*, 406 U.S. at 215. *See* also *Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820 (10th Cir. 1988)(free exercise clause challenge to zoning ordinance requires "evidence in the record" that location of church "is integrally related to underlying religious beliefs.") The Free Exercise Clause of the First Amendment does not grant churches the immunity from being sued in civil courts. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U. S. 619 (1986).

Assuming the Conference had established religious motivation, the free exercise clause would not bar Colorado from enforcing generally applicable religiously neutral rules that prohibit or burden even religiously motivated conduct.

*Employment Division Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

The Conference reliance on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993), at pages 17 through 24 of its Petition is misplaced. Equating a municipal ordinance specifically designed to prevent a religious practice with the neutral application of common law is nonsensical. In *Church of Lukumi*, this Court noted that the inquiry to determine whether a law was neutral is whether the "object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 2227. If the answer is "yes", the law is not neutral and requires a compelling state interest test. The object of the tort of negligence and breach of fiduciary duty is to provide compensation to plaintiffs injured by the tortious conduct of another. The torts are religion neutral and, even assuming the conduct at issue was tied to religious belief, the First Amendment is no defense pursuant to *Smith*.

The Conference contends at pages 22 through 28 that state courts are inconsistent in their approaches to allowing negligence claims against religious organizations and that Colorado itself is internally inconsistent. This claim is based on a misunderstanding of Colorado law and on a misrepresentation of the record supporting the facts in this case. For example, *Roman Catholic Bishop v. Superior Ct.*, 50 Cal. Rptr. 2d 399 (Cal App. 4 Dist. 1996); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991), *Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. 1992), were each cited by the Conference as requiring some notice to the religious entity before liability for negligence in hiring or

supervision could be imposed on it. Colorado, however, has the same requirement. Antecedent knowledge, not any religious belief, provides the basis of liability for an employer negligence claim in Colorado whether the employer is a religious entity or not. *See, Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), cert. denied, ____ U.S. ___, 114 S.Ct. 2153 (1994) (case involving negligent hiring by religious employer) and *Connes v. Molalla Transp. System, Inc.*, 831 P.2d 1316 (Colo. 1992) (case involving negligent hiring by secular employer.)

At pages 10 and 11, the Conference recasts Winkler's claims into claims in which a civil court decided selection of clergy. The recasting is inaccurate. Consistent with federal and Colorado law, Winkler's verdict did not intrude into the clergy selection process. It addressed only the decision by the Methodist Conference to hire Chambers into a position where he was given intimate access to vulnerable women in a counseling setting, when the Conference knew that his history placed those women at risk. By way of analogy, the same analysis would have applied if the Conference had allowed Chambers to drive buses filled with parishioners in situations where the Conference knew that Chambers had a history of driving carelessly. Freedom to select clergy is protected. Decisions by a religious employer to allow clergy involved in secular conduct to harm unsuspecting third parties, is not protected.

At pages 11 through 14, the Conference criticizes the Colorado Supreme Court generally for perceived internal inconsistencies. A review of the cases cited shows that Colorado carefully and appropriately decided the cases cited by the Methodist Conference. *Van Osdol v. Vogt*, 908 P.2d

1122 (Colo. 1996), involved a minister who sued her church concerning her ministry. The Colorado Supreme Court held that the choice of minister is protected. Nothing in that decision runs contrary to this Court's jurisprudence, or to the Colorado Supreme Court rulings in *Moses* or *DeStefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) or *Bohrer v. DeHart*, ___ P.2d ___ (Colo. App 1996), pet. app. C. In distinguishing the negligence claims from internal church conflicts, the *Van Osdol* court stated in footnote 17:

> "...the court...looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring. This inquiry , even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs."

Indeed, in *Winkler*, there was no inquiry into religious beliefs at either the trial or appellate stage of the action.

The Conference also misrepresents the record. The Conference contention in its Petition that Winkler's negligence evidence was limited to "second guessing" (page 2) a Conference which had no knowledge of Chambers' abuse of women before 1992 (page 16) is inaccurate. By its procedures, the Conference rehired Chambers into a specific church each year. Each year the Conference gained increasing knowledge of Chambers' sexually abusive behavior toward women and of the conduct problems related to his alcoholism, as set out on pages 2 through 4, herein, and pages 2a and 3a of pet. app. A. That antecedent knowledge, not any religious belief, provided the basis of

liability for the negligence claim, consistent with Colorado cases as well as cases of other jurisdictions.

By virtue of the Conference changing the pastoral assignments of ministers, it was the only entity that had a complete picture of Chambers' abusive history and his alcohol problem.

At page 19, the Conference contends that the State of Colorado is required to restrict its breach of fiduciary duty claim to claims involving financial affairs. The essential premise of the Conference argument is that when a clergyman is sued for breach of fiduciary duty other than conduct involving taking money, it is his status as a clergyman which gives rise to the fiduciary duty. This premise was directly addressed in *DeStefano* and in *Moses*. When applying the neutral common law tort of breach of fiduciary duty, the relevant inquiry is "not the profession of the defendants. The relevant facts are that the defendants...occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty." *Moses, supra*, footnote 13.[2]

The Colorado Supreme Court has recognized that, under appropriate circumstances, a clergyman, may, but need not be, in a position of trust, just as, depending upon the circumstances, a wide range of persons may seek positions of trust. *See, Moses, supra*, and *DeStefano,*

---

[2]Much of the Conference brief alleges that the Colorado Supreme Court erred when it decided the Moses case. This Court declined to review the decision of the Colorado Supreme Court in that case in 1994 at 114 S.Ct. 2153.

*supra.* The "status" involved, is not clergy or non clergy, it is a person in authority who seeks a special trust such that another has the right to rely on the fiduciary.

A fiduciary duty, under Colorado law, must be undertaken by the fiduciary. *Moses, supra.* In this case, a Conference District Superintendent called a meeting of six of the women who had been abused by Chambers, and told them that the Conference would care for them. The Plaintiff alleged, and the jury found, that the Conference had used the trust it sought in order to manipulate Winkler. The *Winkler* court properly concluded that "(f)iduciary liability requires not only a repose of trust, but an assumption of a duty and a breach of that duty" (pet. app. A, 6a.) and that the Conference had "assumed a duty to act in Winkler's best interests." Pet. app. A, 7a.

Neither the negligence claim nor the breach of fiduciary duty claim was predicated on how Chambers was disciplined in the church grievance procedure: The negligence claim was based on prior notice to the Conference of the danger Chambers posed; the breach of fiduciary duty claim was based, not on how Chambers was treated, but on how Winkler was treated by an entity that sought and then betrayed her trust.

The torts at issue are neutral laws of general applicability, both on their face and in their application. There is no targeting of religious activity. An identical result would have been reached in this case if the Conference had been a non-religious employer whose dangerous employee provided damaging care or counseling to a vulnerable person, and the employer, under pretext of

assisting the person harmed, gained trust and then misused that trust in order to protect itself.

The holding by the Colorado Court of Appeals in *Winkler* is consistent with every decision of this Court. It presents no unsettled or important questions of federal law. Therefore, the petition of the Rocky Mountain Conference of the United Methodist Church should be denied.

**B. Because the Methodist Church never presented record evidence concerning how its tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the actual impact of tort liability.**

Neither the Conference nor Chambers has ever articulated how specific tortious actions were allegedly motivated by a deeply held religious belief. The Conference raises the Book of Discipline, a document which the Conference revises every four years and which contains, among other things, an outline of current procedures used in the Methodist Church. The fact that procedures are written down and set forth in a document does not create a presumption that the procedures are motivated by a deeply held religious belief.

Moreover, none of the specific tortious actions complained of against Chambers or the Conference were either mandated by or prohibited by the Book of Discipline. There is no mandate or prohibition about keeping secret the sexual abuse of its ministers. There is no mandate or

prohibition about deceiving and manipulating vulnerable parishioners. The Conference argues that, since it did not violate its own procedures, the First Amendment prohibits inquiry into its actions. In place of a specific articulation of how the acts complained of were mandated by a religious belief, there is a presumption that, because Chambers is a minister and the Conference a religious organization, all actions are religious. Because of lack of proof that the tortious actions were motivated by religious belief, the Court of Appeals properly found that Chambers' and the Conference's First Amendment defense was meritless.

Because the Methodist Conference has not alleged -- let alone proven-- that its specific tortious acts were "mandated" by its Methodist religious faith, it has not properly alleged any defense to tort liability under the First Amendment. Specifically, the Methodist Church has never argued at trial or in any of the briefs that its Methodist religious faith requires it to (1) hire ministers suffering from active alcoholism and a known history of sexually abusive behavior with women and authorize such ministers to provide counseling to psychologically vulnerable parishioners; (2) allow such ministers to engage in touching the breasts of parishioners; (3) tell the congregation that women abused by Chambers were receiving adequate counseling, when they were not; (4) undermine the credibility of the women abused by Chambers by telling the congregation that there was nothing in his personnel file that indicated he had problems; (5) deceive the women by telling them that it would send a letter to the congregation stating that it found the women's complaints credible, and then failing to send the letter; or (6) assume a duty to act in the best interests of the parishioner and later breach this

duty to protect the Methodist Church or the career of the minister.

The Conference has never articulated a religious motivation or substantial burden to exercise of religion that could provide the basis of the compelling state interest analysis it requests.

The Colorado Court of Appeals properly found that resolution of this case did not require interpreting and weighing of church doctrine, but rather allowed application of neutral principles of law to determine the liability of the Conference. In other words, the Colorado Court of Appeals determined that the burdens imposed by tort liability in this case had not been shown to be burdens on anything but secular conduct.[3]

## II. The Religious Freedom Restoration Act, U.S.C., Sec. 2000bb ("RFRA") does not grant immunity to the Conference.

Congress enacted RFRA in response to this Court's decision in *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, this Court held that the free exercise clause does not bar states from enforcing generally applicable religiously neutral rules

---

[3] The Colorado Court of Appeals' holding is consistent with this Court's jurisprudence in *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Employment Division Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

to prohibit or burden even religiously motivated conduct, such as the use of peyote in religious ceremonies. Believing that laws might burden important religious liberties even if the laws were general and religiously neutral, Congress enacted RFRA to codify the free exercise jurisprudence in cases decided prior to *Smith*. *See* S. Rep. No. 103-111, 103rd Cong. 1st Sess. at 8-9, reprinted in 1994 U.S.C.C.A.N. 1892, 1904.

RFRA requires a compelling interest test that involves a three-stage analysis: (1) Whether the conduct in question is motivated by a religious belief; (2) Whether the state action infringes on the free exercise of religion; and (3) Whether there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Since the Conference has failed to identify conduct protected under either of the first two prongs, there is no basis upon which to apply the third prong.

At pages 14 and 17 of its Petition, the Conference contends, in essence, that RFRA grants it immunity in this case, even if the First Amendment does not. That argument fails for several reasons. Fundamentally,as discussed above, mere assertion that a law burdens some practices that might have a religious tie, has never sufficed to show a substantial burden to the exercise of religion. In addition, under RFRA, there is no defense to tort liability unless the specific tortious acts were actually mandated by religious belief. The Conference has never presented record evidence concerning how its tortious conduct was required by any sincerely held belief, and there is no predicate upon which a RFRA compelling state interest analysis could be predicated.

## CONCLUSION

The Colorado Court of Appeals' decision correctly applied the legal standards as set forth in decisions by this Court by applying uncontroversial, universally accepted principles of constitutional law. Therefore, this Court should deny the petition of the Rocky Mountain Conference of the United Methodist Church.

Respectfully submitted,

HOLLAND, SEELEN & PAGLIUCA
JOYCE SEELEN*
1700 Lincoln, Suite 2530
Denver, Co. 80203
(303)832-7700

*Attorneys for Respondent*

December 6, 1996.

Supreme Court, U.S.
FILED
DEC 30 1996
CLERK

No. 96-888

In The

# Supreme Court of the United States

October Term, 1996

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, a Colorado non-profit corporation,

*Petitioner,*

v.

DIANNE R. WINKLER,

*Respondent.*

**Petition For A Writ Of Certiorari To The Colorado Court Of Appeals**

## BRIEF IN REPLY ON PETITION FOR A WRIT OF CERTIORARI

NEIL QUIGLEY*
QUIGLEY & RITTER
950 South Cherry Street, #1010
Denver, Colorado 80222
(303) 691-6030

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Is a church when hiring, supervising, disciplining and discharging clergy inextricable involve in religious activity protected by the First Amendment of the United States Constitution or is the Church exposed to tort claims while doing so?

2. Where no compelling interest is identified to justify the burden on a religious organizations practice of religion may tort claims be allowed?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

RESPONDENT'S STATEMENT OF THE CASE ..... 1

REASONS FOR GRATING THE WRIT ..... 4

I. THE DECISION OF THE COLORADO COURT OF APPEALS CONFLICTS WITH THIS COURT'S RULINGS ON THE FIRST AMENDMENT PROTECTION AGAINST INTERFERENCE WITH A CHURCH IN ITS ACTIONS INVOLVING CLERGY ..... 4

A. THE CONFERENCES (CHURCH) ACTIVITIES IN THIS CASE WERE NOT "SECULAR CONDUCT" ..... 5

B. CONDUCT OF THE CHURCH IN THIS CASE IS BASED ON SINCERELY-HELD RELIGIOUS BELIEF AND IS SUPPORTED BY THE RECORD ..... 7

II. THE RELIGIOUS FREEDOM RESTORATION ACT, U.S.C. § 2000bb IS APPLICABLE TO A CHRUCH'S ACTIVITY REGARDING CLERGY HIRING, SUPERVISION, DISCIPLINING AND DISCHARGE ..... 9

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

Page

CASES

*Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996) ..... 6

OTHER

Religious Freedom Restoration Act, U.S.C. Sec. 2000bb ..... 9

## RESPONDENT'S STATEMENT OF THE CASE

The statement on page 1 of the Respondent's brief in opposition, ". . . . Based on the *antecedent* knowledge of the Conference that Chambers had sexually approached other vulnerable people and had a long standing and untreated alcohol problem . . . " (emphasis added), is in part not supported by the evidence and is in part misleading. The Conference's investigation of the written official complaint filed by one Carol D. Klein, dated March 19, 1992 (Appendix A, Exhibit 27) uncovered Respondent, Dianne Winkler, had a complaint of sexual harassment by Rev. Chambers. Prior to March 19, 1992, the only remotely comparable evidence of sexual harassment by Rev. Chambers known to the Conference is that in October of 1991 a member of the Grace Church, Jan Place, made a telephone call to District Superintendent Margaret Rush Hankins reporting she was not happy with the way Glenn Chambers spoke to her and acted in her presence but declined to make an official written grievance, as required pursuant to the Book of Discipline of the United Methodist Church. She asked Rev. Rush Hankins to speak to Rev. Chambers about her concerns, which was done and as a result Rev. Chambers had no further communications with Jan Place. The referred to "long standing and untreated alcohol problem" of Rev. Chambers was concealed from the Conference until the investigation as a result of the Klein letter of March 19, 1992. The Conferences' knowledge of Rev. Chambers' alcohol use was that over the course of the period of time of his membership as a Conference clergy person from 1965 to 1992, it received three expressed concerns about Rev. Chambers' use of alcohol and the Conference addressed the issue with Rev. Chambers each and every time it was raised in a reasonable and conscientious manner based on the type of information and its knowledge of the circumstances.

The first inquiry of alcohol use was in 1980 to Bishop Wheatley who worked with Rev. Chambers intimately and had never observed any alcohol involvement with Rev. Chambers. The second was in the 1980s when Rev. Chambers' district superintendent spoke to him, he said he would quit entirely. The next was in the period 1986 to 1990 when an associate pastor whom life had been greatly impacted by her parents use of alcohol and her

brothers death raised the issue. Again, Rev. Chambers said he would stop.

The Grace United Methodist Church Pastoral Relations Committee requested the return of Rev. Chambers as its senior pastor each year of the thirteen years he was appointed to Grace United Methodist Church by the Rocky Mountain Conference without any expressed concern.

The statement on page two that the 1972 investigation involved "another woman" is itself incorrect. In 1972 Bishop Stuart appointed an investigating committee to look into the breakup of Rev. Chambers' first marriage to determine if there was any "un-ministerial conduct and/or imprudent and un-Christian conduct," as defined in the Book of Discipline of the United Methodist Church, in the breakup of Rev. Chambers' marriage which paralleled society's view at that time that there had to be misconduct on the part of one of the parties to a divorce. In that investigation the then-wife of Rev. Chambers told the committee there "appears" to be "another woman" involved, although two college-age daughters of the marriage said they had no knowledge of a third party, and the committee "after careful consideration and deliberation, . . . agreed there are no grounds for formal charges to be placed against Glenn A. Chambers." See Appendix B, Plaintiff's Exhibit 29, which are the documents as admitted relating to the 1972 matter. In addition, Rev. Chambers testified the 1972 breakup of his marriage investigation related to alcohol use. See Appendix C, copies of trial transcript Vol. 12, pages 158, 159, 184 and 185.

On page two the Respondent also has stated, " . . . The 1986 complaint of Rev. Munsey-Nielson, a female associate pastor of Grace Church that Chambers, on occasion, came into her office, touched her inappropriately, and told her to 'pucker up.' In 1986, Rev. Munsey-Nielson told a district superintendent for the Conference about concerns expressed to her by other women regarding Chambers' actions towards them." The part about "concerns expressed to her by other women regarding Chambers' actions towards them" is not supported by anything in the record. See attached Appendix D, transcript, Vol. 10, pp. 148-164.

Further, Rev. Munsey-Nielson's statement to a district superintendent was not to her district superintendent but to a personal

friend who was a female district superintendent, an admittedly substitute mother figure. The conversation was in confidence, with an indication that Rev. Munsey-Nielson was handling the matter herself and she did not further report it officially to the Conference.

On page two is also the statement, "In 1990, Chambers approached the wife of Junior Minister Harold Anderson, who reported it to the local church. . . . When Conference officials were told directly of Pam Anderson's complaint in 1992, . . . " is a misleading statement which would imply the Conference was aware of Pam Anderson's complaint in 1990 when the truth of the matter is it did not come to the Conference's knowledge until after the March 19, 1992 letter of Carol D. Klein which was the instigating factor for the Conference identifying Dianne Winkler, Pam Anderson and a number of other women as complaining about the conduct of Rev. Chambers.

At the top of page three is a reference to the Jan Place matter, which again is attempting to mislead. When Jan Place called District Superintendent Margaret Rush Hankins in October of 1991, Rev. Rush Hankins knew Jan Place was a member of the Grace United Methodist Church and, since Rev. Chambers was the senior clergyman at the Grace United Methodist Church under her supervision, it was an obvious response by Rev. Rush Hankins when Jan Place started speaking about a minister's conduct that it would be related to Rev. Glenn Chambers. Jan Place had told Rev. Rush Hankins that Rev. Chambers never touched her except for a hug and a caress of her face, wiping away a tear when she came to talk to him about her father making threats of committing suicide. Jan Place testified that her complaint about Rev. Chambers was not identified by her as a sexual matter but that his conduct towards her made her uncomfortable.

On page four Respondent statement, "The church's failure to investigate the growing complaints against Chambers subsequent to 1972" is an exaggerated overstatement as the 1972 matter had to do with the breakup of his first marriage and whether or not there was a violation of the Book of Discipline concerning ministerial conduct and the remaining three matters that were brought to the attention of the Conference from 1972 to 1992 had to do with the question of Rev. Chambers' use of alcohol. The first such alcohol use inquiry did not occur until 1980. There was no "failure to

investigate" and there was not "growing complaints" against Rev. Chambers prior to the March 19, 1992 written letter of Carol D. Klein.

The statement on page four, " . . . the church is undermining the credibility of the women by telling the congregation there was nothing in Chambers' history that indicated he had problems" is only true in that there were no actual prior complaints about Rev. Chambers of a problem with women, so there could not be any statement about Rev. Chambers' history other than that there had been no reported problems to the Conference about women.

The statement on page 4, "Telling the congregation that the women hurt by Chambers were being given counseling, when they were not" is a misstatement. Rev. Rush Hankins had brought an Episcopal therapist to the first meeting with the women who had complaints against Rev. Chambers, recommended by the personal counselor of Carol D. Klein. These women themselves chose subsequently to see as a group another therapist who was recommended to them by the interim pastor at Grace United Methodist Church, not the Conference.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION OF THE COLORADO COURT OF APPEALS CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE FIRST AMENDMENT PROTECTION AGAINST INTERFERENCE WITH A CHURCH IN ITS ACTIONS INVOLVING CLERGY.

As can be readily seen by Statement of Facts as set forth by the Respondent, the alleged basis for finding the Conference responsible for the tort of negligent hiring and supervision rested upon an investigation of the 1972 breakup of Rev. Chambers' first marriage and a few questions raised at the Conference about Rev. Chambers' use of alcohol. There was no known knowledge on the part of the Conference of any complaints about Rev. Chambers' sexually harassing women until March 19, 1992 when Carol D. Klein filed her written grievance and the Conference conducted an investigation during which they identified Dianne Winkler and others as women who had similar complaints they had never reported to the Conference. The basis for the claim on fiduciary

duty relates to the Conference's actions in pursuing the complaint of Carol D. Klein against Rev. Chambers.

The Conference placed in evidence as Exhibit A the Book of Discipline of the United Methodist Church which is the denomination's implementation of its faith originated over 200 years ago, founded in 1784 and has been subject to amendment each four years at the General Conference of the denomination. The 1988 Book of Discipline, Defendant's Exhibit A, was the discipline which applied to the present case, states at page V, "The Discipline sets forth the theology grounding of the United Methodist Church in Biblical faith . . . ". The Book of Discipline states at ¶ 453 that the grievance procedure is based on "Ordination and membership in an Annual Conference in the United Methodist Church is a sacred trust. The qualifications and duties of . . . (ministers) . . . flow from the Gospel as taught by Jesus the Christ and proclaimed by his Apostles." It goes on to state the grievance procedure is " . . . the reconciliation and restoration of the ordained minister and the strengthening of the church. If the remedial process is unfruitful, discontinuance or termination may follow. A grievance is a written and signed statement claiming misconduct or unsatisfactory performance of ministerial duties. The person filing the grievance of the process for the filing of the grievance and the ordained minister shall be informed of the process and its purpose."

The above are required by the United Methodist Church and are based on their religious belief and procedures. These are the religious beliefs and activities protected by the First Amendment and cannot be second-guessed under tort claims as argued by Respondent.

## A. THE CONFERENCE'S (CHURCH) ACTIVITIES IN THIS CASE WERE NOT "SECULAR CONDUCT"

As this Court has previously held numerous times, religious organization's activities concerning the hiring, supervision, disciplining and discharging of its clergy is inextricably rooted in its religious belief and practices. In the present case, Respondent Dianne Winkler was permitted to attack the very fabric of the

Conference's hiring, supervision, disciplining and ultimately retiring Rev. Chambers under very strict circumstances.

When you allow tort claims to be brought against a religious organization concerning its clergy, which second-guess their handling of a divorce by the clergy person twenty years before the complained of tort allegedly occurred or questioned the manner in which the Conference responded to inquiries concerning alcohol use by a clergy person three times in 27 years, you are invading and burdening the free exercise of religion by the religious organization.

The Conference is not arguing that sexual harassment of congregation members by appointed clergy is per se protected by the First Amendment Free Exercise Clause or Establishment Clause, but that the courts cannot intrude into ecclesiastic decisions regarding clergy without the issue involving both the Free Exercise Clause and Establishment Clause, because it involves governmental intrusion into both ecclesiastical and individual decision making. The appointment, supervision, discipline and discharge of clergy is inherently of prime ecclesiastical concern and inextricable from religious doctrine. The Colorado Supreme Court, in the case of *Van Osdol v. Vogt,* 908 P.2d 1122 (Colo. 1996), clearly acknowledges this to be the case. However, in footnote 17 on pages 1132 and 1133, the Colorado Supreme Court evades this very stated principle by allowing an exception if at the time of hiring the church had reason to believe that hiring the clergy person would create an undue risk of harm to others and the specific danger which ultimately manifests itself could reasonably have been foreseen at the time of hiring. This inquiry is to be limited and factually based, accomplished with no inquiry into religious beliefs. However, even this attempted exception by the Colorado Supreme Court was not what has taken place in this case, as there was no prior knowledge on the part of the Conference of any specific danger which ultimately manifests itself, i.e. sexual harassment, and therefore the Conference could not have foreseen such conduct on the part of Rev. Chambers. In the present case, the evidence used to support the tort claims consisted of second-guessing and misrepresenting an investigation twenty years before, involving the breakup of Rev. Chambers' marriage and approximately three inquiries to the Conference concerning alcohol use by

Rev. Chambers and the response of the Conference to each of those inquiries. There is no evidence in this case that the breakup of the marriage 20 years before or a problem with alcohol three times in 27 years, in any manner equates to a notice of a potential claim of sexual harassment. Respondent in this case was permitted by the Colorado courts to go forward with a claim clearly in violation of the First Amendment protection afforded to religious organizations in dealing with their clergy. The evidence of the claimed torts by the Conference was not "secular conduct," as attempted to be argued by the Respondent in this case.

### B. CONDUCT OF THE CHURCH IN THIS CASE IS BASED ON SINCERELY- HELD RELIGIOUS BELIEF AND IS SUPPORTED BY THE RECORD

The record in this case on the evidence established the Conference (1) was never aware of any complaint of sexual harassment by Rev. Chambers prior to March 19, 1992 and (2) upon receiving a written grievance required under the Book of Discipline of the United Methodist Church about sexual harassment by Rev. Chambers, it proceeded forwarded, following the Book of Discipline procedures, to process the complaint against Rev. Chambers which resulted in his suspension, forced alcohol treatment, revocation of his appointment to Grace United Methodist Church, requiring him to undergo psychiatric evaluation, and ultimately caused him to be retired under severe restrictions preventing him from referring to himself as a United Methodist minister or conducting any type of activities as a minister. During the entire process of hiring, supervision, disciplining and discharging Rev. Chambers, it did not conduct any "tortious conduct" toward Respondent Dianne Winkler or any of the other women who had complaints against Rev. Chambers and at all times the Conference was proceeding on the basis of its sincerely held religious beliefs and practices. The statement on page 13 by Respondent in her Brief at the end of the second paragraph from the bottom of the page that, "The fact that procedures are written down and set forth in a document does not create a presumption that the procedures are motivated by a deeply held religious belief," reflects a clear lack of appreciation for the manner in which the United Methodist Church has conducted its

business since its inception and ignores the very language within the Book of Discipline which states:

> "The Discipline is the book of law of the United Methodist Church. It is the product of many General Conferences of historic religious bodies which now form the United Methodist Church."
>
> "The Discipline as the instrument for setting forth the laws, plan, polity, and process by which United Methodists govern themselves remains constant. Each general conference modifies, elaborates, clarifies, and adds its own contribution to the Discipline. We do not see the Discipline as sacrosanct or infallible, but we do consider it as a document suitable to our heritage. It reflects our understanding of the church and of what is expected of its ministers and members as they seek to be effective witnesses in the world as a part of the whole body of Christ."
>
> "The Discipline sets forth the theological grounding of the United Methodist Church in biblical faith . . . "

The Discipline is clearly and completely a setting forth of the deeply held religious belief of the United Methodist Church and the effort of the Respondent to trivialize and void this fact of itself speaks volumes for the need of this Court to grant the Petition for Writ of Certiorari and require the Colorado courts to recognize the full extent of the First Amendment and its protection to religious organizations when they are dealing with their own clergy.

The Respondent's continual attempts to claim that the Conference in this case is attempting to hide behind the First Amendment so it can commit tortious acts shows a lack of understanding of the argument being made by the Conference. The alleged tortious acts of sexual harassment, if they occurred, were done by Rev. Chambers. The tort claims against the Conference are based upon second-guessing its conduct in hiring, supervising, disciplining and discharging Rev. Chambers in the light of this alleged conduct, which the record establishes it did not prior to March 19, 1992 have any information concerning the complaints against Rev. Chambers for sexual harassment. The Conference's conduct in dealing with

its clergy is at all times protected by the First Amendment and such second-guessing is not permitted.

The statement by the Respondent on page 14 in the second paragraph that Rev. Chambers had a "known history of sexual abusive behavior with women" is not true until after the March 19, 1992 filing of a written complaint by Carol D. Klein, investigation of which led to the Respondent, Dianne Winkler, and a number of other women who had similar complaints and immediate action was taken by the Conference upon receipt of such complaint. Thus, there was not a "known history" which could have led the Conference to take action prior to the time that it did in this case.

## II. THE RELIGIOUS FREEDOM RESTORATION ACT, U.S.C., § 2000bb IS APPLICABLE TO A CHURCH'S ACTIVITY REGARDING CLERGY HIRING, SUPERVISION, DISCIPLINING AND DISCHARGE.

Contrary to the statements of the Respondent, the Religious Freedom Restoration Act in this case would require a compelling interest test. The first of the three-stage analysis is whether the conduct in question is motivated by a religious belief. The hiring, supervision, discipline and discharge of clergy is motivated by a religious belief.

The second stage is whether the state action infringes on the free exercise of religion. Whenever the state second-guesses the activity of the religious organization in the manner in which they hire, supervise, discipline and discharge clergy, it is infringing on the free exercise of religion. The third stage is whether there is a state interest of sufficient magnitude to override the interest, claiming protection under the Free Exercise Clause. The Colorado courts in this case have not even addressed the issue of what the state interest is in preventing sexual harassment which would create a sufficient magnitude to override the church religious activities and beliefs in dealing with clergy. It must be remembered that we are not talking about Rev. Chambers' conduct and responsibility, but we are talking about the Conference's actions and responsibility where women claim sexual harassment by Rev. Chambers.

The allegation by the Respondent that the Religious Freedom Restoration Act requires the actual tortious acts of Rev. Chambers in sexually harassing the women be mandated by a religious belief in order to come under the act is to misunderstand and fail to separate the conduct and rights of the Conference and those of Rev. Chambers, both of whom are separate entities in considering tort claims against them. Rev. Chambers is the one accused of sexual harassment, not the Conference.

## CONCLUSION

The Colorado Court of Appeals' decision does not comport with the previous pronouncements of this Court in areas where a church is hiring, supervising, disciplining and discharging its clergy. This activity is inextricably involved in a religious activity protected from tort claims by the First Amendment of the United States Constitution. In addition, there is no compelling interest identified in this case to justify the burden placed on the church in its practice of religion to allow direct tort claims based on second-guessing the actions of the Conference in handling clergy.

Dated this 27th day of December, 1996.

Respectfully submitted,

NEIL QUIGLEY
QUIGLEY & RITTER
*Attorneys for Petitioner,*
*Rocky Mountain Conference*
*of the United Methodist Church*
950 South Cherry Street, Suite 1010
Denver, Colorado 80222
(303) 691-6030

# APPENDICES

## APPENDIX A

MINE

March 19, 1992

To:

The Rocky Mountain Conference of
The United Methodist Church

From:

Carol Klein,
Grace United Methodist Church

Having lived in fear for too long that I would be subjected to further improper sexual attentions by the Reverend Glenn R. Chambers at MY CHURCH, Grace United Methodist; I feel the time has come today to stand up for my Self and for the rights of others who may be afraid to speak.

This cannot continue. I feel I was not the first, nor was I the last. It was very wrong, and if I can not be SAFE in my church – where CAN I be safe?

Glenn Chambers must be stopped! There MUST be NO MORE VICTIMS! NO MORE! I am considering going to Civil Court.

Respectfully,

Carol A. Klein
3399 So. Galend Ct.
Denver, Colorado
80231-4729

## APPENDIX B

The Conference Investigating Committee was called together by Delbert Paulson the request of Bishop Stuart.

The full committee met at Park Hill United Methodist Church, Denver, Friday, March 3, 1972 at 1:15 P.M. Those present were: J. Carlton Babos, H. Preston Childress, Bronston M. Greenwood, Donald J. Grooters, William L. Woelfle, Delbert Paulson served as chairman, Donald J. Grooters, Secretary.

The case for consideration was that for ascertaining whether or not there was possible unministrial conduct and/or imprudent and unchristian conduct as these relate to the break-up of the home and filing for divorce on the part of Glenn A. Chambers.

Information was given the Committee that Loveland Pass was closed and therefore it would be impossible for the Committee to go to Glenwood Springs to talk with Joan Chambers (wife).

It was agreed that inasmuch as the Committee could not get to Glenwood Springs to visit face to face with Joan Chambers, we visit with her by telephone.

The Committee travelled to Ft. Collins and interviewed Debra (Debbie) Chambers at 3:30 P.M. at First United Methodist Church. She is a Freshman at Colorado State University.

The Committee returned to Denver and visited with Cynthia (Cindy) Chambers at Headquarters at 5:30 P.M. She is a Senior at the University of Denver.

Both girls indicated in varying intensity that their father had given insufficient time and attention to the family. They both affirmed no knowledge of a "Third party" being involved as a contributing factor in the present divorce proceedings.

The Committee visited with Joan Chambers by telephone 8:30 - 9:15 P.M. She indicated that "another woman" "appears" to be involved. She feels that she has tried to hold the home together.

The Committee met with Glenn Chambers Saturday 9:30 A.M. in East United Methodist Church, Colorado Springs.

Dr. Rex Williams, psychiatrist, visited with the Committee (10:30 A.M.)

Wesley Strain, chairman of the Pastor-Parish Relations Committee of St. Paul Church, met with the Committee (11:30 A.M.)

Pete Barber, Superintendent of the Colorado Springs District met with the Committee (noon).

Dr. Richard Bell, St. Paul Church members and family friend, visited with the Committee at 12:30.

Glenn Chambers met again with the Committee at 2:00 P.M. and we further discussed with him some of the information, impressions and evaluations which the above people had shared.

After careful consideration and deliberation it was agreed that there are no grounds for formal charges to be placed against Glenn A. Chambers. The committee recommends that he receive professionally adequate personal counseling. The committee also recommends that Joan Chambers

receive professional counselling and be assured adequate legal counsel during the divorce proceedings.

The Committee recommends that the Colorado Springs District Superintendent help implement the above mentioned recommendations.

Adjourned – 3:00 P.M.

/s/ Donald J. Grooters
Donald J. Grooters
Secretary

---

March 21, 1972

Dear Don:

I have received your two letters and the copy of your report of the Investigating Committee with regard to Glenn Chambers. Don, I am deeply grateful to you and to the members of the Committee for the job you have done. It is difficult, I know, and yet I have the feeling that you five men have handled this with a great deal of compassion and objectivity.

I sincerely hope Glenn will get counseling. He has indicated in the past that he did not need it. In fact, Dr. Williams felt that it would take some great shock to make Glenn get the kind of help that he desperately needs. If Glenn will get psychiatric help and get himself squared away, it will enhance his effectiveness significantly. It is a

tragedy that the family did not get help earlier so that they could be held together.

I was glad to get the word on Louis Haruf. I had been reasonably certain that he was going to retire, but it makes it definite to have this word.

I see no reason why we should not seriously consider Lonnie Eakle for your staff, and I am sure the men are discussing this while I am away.

We are certainly happy that Ron is now home. What a blessed relief it is to you and Bernie to have him safely back.

We miss seeing you and Bernie from time to time. Your friendship is one of our most valuable possessions. Blessings on you both.

Sincerely,

Bishop R. Marvin Stuart

Dictated by Bishop Stuart
Signed in his absence
RMS/th

The Reverend Donald J. Grooters
108 E. 18th St.
Cheyenne, Wyoming 82001

THE FIRST UNITED METHODIST CHURCH
(LOGO) MINISTERS
PHONE 632-1410 Donald J. Grooters
Louis A. Haruf
108 East 18th Street – Cheyenne, Wyoming 82001

March 7, 1972

Bishop R. Marvin Stuart
2200 S. University Blvd.
Denver, Colorado 80210

Dear "Bish":

If I have correct information you and Mary Ella are on vacation and I sincerely hope you are getting some wonderful relaxation and refreshing. It probably is past-due.

I am enclosing the minutes of the recently completed meeting of the Conference Investigating Committee in regard to Glenn Chambers. Of course, the minutes do not reflect the intricate and complex nature of the whole situation.

We are very strongly convinced that both Joan and Glenn are in need of good psychiatric counselling.

I am sure that Del will be very willing to fill you in on much of the details as we finally were able to piece it together. I will be willing to visit further with you about any part of it, if you so desire.

I do have another matter to share with you that I will put in a separate communication.

I did want you to have the report of the Investigating Committee as soon as possible.

Cordially,

/s/ Don
Donald J. Grooters

Encl. 1
DJG/jb

## APPENDIX C

93CV378

94 CA 652
94 CA 661

DIANNE R. WINKLER
VS
GLENN CHAMBERS, ET AL

VOLUME 12

PAGES 1-232 (Reporter's Transcript)

94CA0652

94CA0661

[p. 158] A Yes, sir.

Q That was the church you were pastoring?

A Yes.

Q Now, you indicated that you don't recall much about this March 1972 investigation, is that true?

A That is true, sir.

Q In the investigative report it says that the committee met with Glenn Chambers. Do you recall any meeting like that?

A I'm sorry, I do not recall sitting with the committee. If the minutes indicate that I very likely did if that's what they said I did. I do not recall at the moment sitting with the committee.

Q You don't remember. Do you know Donald Grooters?

A Yes, sir. I do know Donald Grooters.

Q You don't recall meeting with him about some concern the Conference had?

A I do know that someone had approached me that there would be a Committee on Investigation because of the concern I thought of alcohol that my then wife had brought up, and as I look back I don't remember who it was. If I was guessing I would have thought it was my district superintendent who called that to my attention, Pete Barker. That doesn't mean Donald Grooters did not [p. 159] speak to me. It just means I don't recall that.

Q Was alcohol a problem in the break-up of your first two marriages?

A I believe so.

Q Was there other problems that you recall at this time that were worth mentioning in the break-up of your marriages?

A No, sir. When you say, "worthy mentioning," you mean something I heard since I have been in trial or at that time?

Q Particularly at that time, or any indication, in other words, other than the fact you and your wives grew apart.

MR. MORRATO: Can we approach the bench, Your Honor?

THE COURT: Yes.

(Whereupon, the following was had at the bench out of the hearing of the jury)

MR. MORRATO: I want to be sure we're not getting into the area of the alleged involvement of his step-children. If we're getting into that, or if we're getting into the alleged suggestion there might have been a problem with him and his daughters in the 1972 investigation, those are two of the areas that the plaintiff is precluded from going into, and I want to be

* * *

[p. 184] discussing it in the context of that, as I recall, which probably would have been in March.

Q Probably would have been in March?

A I think so. That's when Mr. Custard talked with me.

Q When did you talk with Harold Anderson?

A I don't remember the date of that.

Q After you touched Carol Klein's breast, would that be in 1985?

A I don't recall the date. It would have been somewhere in the '80's, yes.

Q You said it shocked you?

A Yes.

Q You never apologized to Carol Klein, did you?

A No, ma'am; not for that I did not.

Q You indicated to this jury you believe the 1972 investigation was about alcohol?

A Yes, ma'am.

Q And there was some report out there that said there is absolutely no basis for believing there is any problem?

A I believe the report that I saw said after a thorough investigation, this won't be exact, after a thorough investigation there were no grounds for charges to be brought against me.

[p. 185] Q Which wasn't true according to what you told us today. You had a serious alcohol problem in 1972, correct?

A The committee did not know that.

Q Actually, this committee had no idea you had an alcohol problem, did they?

A No. Nor did I at that time.

Q Isn't it correct this Investigation Committee had nothing to do with alcohol?

A No, ma'am, I don't believe that.

Q Are you aware that Bishop Stuart denies that being the focus of his investigation in 1972?

A I saw something since this trial began and I believe that Bishop Stuart had a concern.

Q Isn't it correct that you were aware Bishop Stuart denies that this investigation had anything to do with alcohol?

A Since this trial began I have gotten that information; not before.

Q You also read the letter from the bishop which says there that the problem has been addressed before, correct?

A I wouldn't have a good recall on the letter, because I had seen no letter until we came here and I have not read that in detail.

---

## APPENDIX D

93CV378

94 CA 652
94 CA 661

DIANNE R. WINKLER
VS
GLENN CHAMBERS, ET AL

VOLUME 10

PAGES 1-221 (Reporter's Transcript)

94CA0652

94CA0661

[p. 145] bench outside the hearing of the jury:)

MR. QUIGLEY: Your Honor, I am going ask you consider letting this witness testify without the presence of the jury on the confidentiality issue to see if the rest of her testimony is admissible.

THE COURT: What confidentiality issue? The way I understand, this witness will be allowed to testify on the matter she told to Reverend Janice Sumner, and it's been represented that we believe she said she did not intend to have it passed on to anybody else. And I think she has said, in fact, her testimony in the deposition, when I re-read it, she intended – or told Reverend Sumner she was going to handle it herself.

MS. SEELEN: She also said there was no binding of confidentiality.

THE COURT: It is ruled that the statement of Reverend Munsey and the request to Sumner, that it not go any further because it was confidential or whatever,

the testimony would be admissible. The fact that it wasn't her intent or may not have been her intent to go further may go to the weight in terms of notice to the Conference. I don't believe that it affects the admissibility.

MR. MORRATO: Your Honor, I wanted to approach for a different reason. This was one of the [p. 146] areas of testimony where the Court was concerned and we discussed by motion for severance and separate trial. This is the testimony of a womanizer, her testimony that she had an opinion that he was a womanizer. It was, I believe, Plaintiff's understanding that this opinion of hers was reported to Sam Day, the District Superintendent, and the Court was going to permit that testimony that the womanizer report was reported to Sam Day and was going to limit that strictly to the Conference.

THE COURT: Okay.

MR. MORRATO: I have re-read her deposition on several occasions and she clearly testifies she had that opinion, but, she never did share it with Sam Day. Therefore, I'm going to ask the Court to exclude any testimony concerning her privately held opinion that he was a womanizer because she never communicated it to anybody at the Conference or the church.

MS. SEELEN: Your Honor, I have gone through the deposition. I never thought she said it to Sam Day, I thought she said it to the District Superintendent, Jan Sumner. And when you go through the deposition –

THE COURT: That is something that may be acceptable to the presence of the jury.

[p. 147] MS. SEELEN: You can't tell from the deposition, and I think it's well put.

THE COURT: It might make sense to excuse the jury for a few minutes and I can give – as long as we are going to do that, the inquiry can be directed at what she told Sumner and whether she mentioned whether she told Sumner not to tell anybody.

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: Members of the jury, we have to take up a matter out of your presence very briefly.

At this time, could you please go to the jury room. Please leave your note pads and folders either on the railing or on the chair. We should be with you shortly.

(The jurors returned to the jury room.)

(The following proceedings were had in open court outside the presence of the jury:)

THE COURT: Let the record show the jury has left the courtroom.

Ms. Seelen do you want to proceed with the offer of proof with regard to the notice to reconcile?

DIRECT EXAMINATION

BY MS. SEELEN:

Q Would you state your name.

[p. 148] A Janet Muncey-Neilson.

Q Is that Reverend Neilson?

A Yes.

Q Reverend Neilson, prior to taking the position at Grace Church in 1986, you had a conversation with Reverend Sumner; do you remember that?

A Yes.

Q What did you discuss with Reverend Sumner?

A I discussed with Reverend Sumner that I had heard rumors that Glenn Chambers was drinking and I was concerned about that.

Q Did you discuss with her any other concerns that you had about Glenn Chambers at that time?

A No.

Q Did you at that time tell her that your concerns were given to her in a confidential relationship?

A At that time?

Q Uh-huh.

A No.

Q Ever?

A Well, I'm not exactly sure what you mean.

Q Okay. Did you discuss with Reverend Sumner your concerns about Glenn Chambers?

A Yes.

[p. 149] Q At a later date?

A Yes, I did.

Q That was November of 1986?

A Yes.

Q That was after you accepted the position at the Grace Church?

A Yes.

Q What did you tell Reverend Sumner in 1986, November of 1986?

A I gave Reverend Sumner a note, a copy of a note I had given to Glenn asking Glenn not to touch me, and that's the conversation that was in confidence.

Q That conversation was in confidence?

A Yes.

Q Do you recall me asking you at your deposition whether that conversation was in confidence and you said no?

A I'm a little confused about what Conference it is at this point.

THE COURT: I was going to raise that also, Ms. Seelen. I think the point here as discussed at the bench is whether the statements were given by Reverend Muncey-Neilson to Ms. Sumner with the understanding that Reverend Sumner – that she should not go any further or report to the Conference. That's basically the issue.

[p. 150] Q (By Ms. Seelen) Did you tell her that you do not want to go any further and it should not be reported to the Conference?

A What I told her was I wanted to handle the situation myself.

Q You did not tell her you were giving it to her in confidence?

A I didn't use those words.

MS. SEELEN: Your Honor, I would just like to quote – ask her, do you recall saying this:

MR. QUIGLEY: What page and line.

MS. SEELEN: Page 72.

THE COURT: Page 72?

Q (By Ms. Seelen) Question: "Was she free to pass that information on without your permission or for a better way of putting it, did you give her that information in confidence?

I don't remember giving her that information in confidence, but if someone gives me information, it's a judgment call on my part.

A I said that?

MR. QUIGLEY: Did you read the full thing?

Q (By Ms. Seelen) Do you recall saying, "I don't remember?" I don't remember giving her that information in confidence, but if someone gave me [p. 151] information, it's a judgment call on my part. If they said they did the not want that passed along, that they wanted to handle it – I said I didn't necessarily want to pass that along.

THE COURT: I would seek to clarify something. When you say, "I didn't necessarily want her to

pass it on," was that what you were thinking or is that – did you tell her that?

THE WITNESS: No, I told her I didn't want her to pass that along.

THE COURT: Okay. I don't want to suggest anything to you now. I'm trying to get to the bottom line issue here.

What did you tell her?

THE WITNESS: I told her I wanted to handle it. I didn't want her to pass it along.

THE COURT: When you say that, what are you referring to?

THE WITNESS: The information I gave her about Glenn. The note that I gave her.

THE COURT: When you say the "information," what information are you referring to?

THE WITNESS: The information I am referring to is that Glenn had come in my office on Sunday mornings a couple of times and touched my arm and [p. 152] one time puckered up.

THE COURT: And what was your relationship with Reverend Sumner at the time in terms of professional acquaintanceship or personal, that sort of thing?

THE WITNESS: I had worked with her at Thornton. I was a student and she was the minister, and I considered her a friend.

THE COURT: All right.

Q (By Ms. Seelen) Reverend Muncey, have you spoken with Mr. Quigley's office about this?

A About what we're discussing right now?

Q Yes.

A Not in general. You mean the deposition part of it? I haven't talked with anyone about the deposition.

Q Have you spoken with anybody about the confidentiality question?

A Yes.

Q Who?

A Well, when you say about the confidentiality, yes, the question – I don't remember talking with the Conference lawyers specifically about the confidentiality issue.

Q When did you talk with them?

[p. 153] A I talked to them on a couple of occasions and I don't remember the dates.

Q Did you get a letter from Mr. Quigley saying you weren't supposed to talk to me?

A I don't remember that. I don't remember it saying we weren't supposed to talk to you.

Q What do you remember it saying?

A I remember it saying that you were asking people to talk with you and that the Conference lawyers did not think that was "proper," but that we were not – we were not told not to talk to you.

Q Did the letter say that Mr. Quigley thought I was acting unethically?

A I don't remember the specific words.

Q Was that the tone of the letter?

A I'm not sure how to answer that.

MS. SEELEN: Your Honor, I would like to give the Court Ms. Muncey Neilson's deposition, at least that portion of it. It referred to the letter. She gave a copy to Janice Sumner.

THE COURT: What specific portion of the deposition are you referring to?

MS. SEELEN: It's sort of roughly circled in red, Your Honor.

THE COURT: All right.

[p. 154] All right. I have read the deposition. What's your position with regard to admissibility, Ms. Seelen?

MS. SEELEN: Your Honor, I think it's clear from the context that we are not dealing with a privilege question. We are the not dealing with a question of whether or not there is some specific statutory privilege that precludes this from coming into evidence. The only question then becomes the real reasonableness of the actions of Jan Sumner.

There is no question – excuse me, Your Honor. There is no question that she is a District Superintendent of the Rocky Mountain Conference. The District Superintendent of the Rocky Mountain Conference was told a specific concern regarding inappropriate touching by Glenn Chambers. At that point, I think that there is a notice to an agent, a clear agent of the Rocky Mountain Conference.

I think it's up to the jury to decide whether it was reasonable for Reverence Sumner to – to keep that information to herself without checking further. She never asked – she never asked Reverend Muncey whether she could pass along or investigate. I think the question becomes: Is it reasonable for a District Superintendent to keep that information to [p. 155] herself.

THE COURT: Thank you. Mr. Quigley?

MR. QUIGLEY: First, Your Honor, I want to address the apparent attack that I have somehow influenced this witness. What occurred – we have two cases going. One is in Judge Peterson's court, and Ms. Seelen sent a request, or a notice, that she was going talk to a whole stream of witnesses concerning both cases.

The issue came to a head in Judge Peterson's court, and Judge Peterson said we had to make a decision, we, the Conference, as to who we felt were agents and who were not. And those who are not, Ms. Seelen can talk to them. I did send a letter to begin with saying we had this disagreement saying that I felt one way and Ms. Seelen said – after Judge Peterson ruled, we had to make the decision. We made decision as to who the agents were, those that were employees of the Conference not the members of the Conference.

The Reverend Muncey-Neilson is not employed by the Conference. So we then wrote another letter – the Judge entered an order telling us we had to do that, and we did that on the record in her courtroom. We then wrote a letter to witnesses as well as that one indicating to them that it was up to them whether they [p. 156] talk to her. In fact, we said that the Court – in the other case,

had told us we had to make this decision and we had made it, and we felt Reverend Muncey-Neilson was not that.

That's the context this all came up in. I will state on the record that I had two conversations at least with Reverend Muncey-Neilson, maybe two or three telephone calls early on, a meeting in my office early on. That I did not at the time of her deposition, did not intend – but I did talk to her before that.

The only other contact that I had with Reverend Muncey-Neilson in this case, I believe she called me a few weeks ago and said Mrs. [sic] Seelen wanted to come to the office and discuss the case. We discussed it at that time. I said it was up to her whether she went there or not. It was her choice, that I couldn't advise her not to go or to go. It was her choice.

I don't know whether she went or not. I didn't speak to her. I didn't see her since. I didn't talk to her until today, until she took the stand. That's the first part. I think that's important to get in the record so there is no question about this later.

The second thing is that it's clear that the testimony of Reverend Muncey-Neilson here today is without influence by the Conference or Reverend [p. 157] Chambers' counsel, that she has said she intended that to be confidential.

And two, there has been no indication that she indicated to anybody or personally held an opinion of Reverend Chambers before she took the job. I think under both those circumstances it's very clear that this testimony is

not admissible in this case. To do so would be severely prejudicial, I believe, to the Conference and to Reverend Chambers.

If it was not meant to be passed on to the conference, even though her friend happened to be a District Superintendent but not her District Superintendent, that it be inappropriate.

Thank you.

THE COURT: Thank you.

Mr. Morrato, this evidence, if it is admissible, it's only admissible to the Conference? Or the statement –

MR. MORRATO: My concern is only the womanizing.

THE COURT: First, with regard to your statement for the record, Mr. Quigley, there are situations where there is some question as to whether or not we should talk to other people, and they consult a lawyer about it, and the lawyer acts the way a lawyer [p. 158] feels is appropriate. This really doesn't enter into my decision in terms of the admissibility in light of the testimony that was elicited. I permitted you to make a statement for the record, and the record stands in regard to that.

With regard to the admissibility of the testimony, it's clear that at the time of the conversation, Reverend Sumner was an agent of the Conference or a District representative. So find. And also that there was some question as to whether or not there was a flat prohibition imposed by Reverend Muncey-Neilson as to the condition of giving this information to Reverend Sumner.

Her deposition, the testimony which stands basically in terms of evidence on the same footing as her testimony in court, is somewhat different from her testimony in court. And based upon her deposition testimony, certainly this is a question as to whether Reverend Sumner was given this information under such circumstances that it would have been as a matter of law unreasonable for her to report it to the Conference.

Basically, it boils down to whether or not – what action Reverend Sumner took with this information. It goes to the reasonableness of her conduct, or it's a question of the reasonableness of her [p. 159] conduct, and it – the statements made by Reverend Muncey-Neilson may affect the weight of the testimony in terms of notice, but it doesn't serve to exclude the testimony.

Could you please get the jury from the jury room?

MS. SEELEN: Your Honor, did I leave the deposition up there?

THE COURT: Yes, you did.

THE COURT: Ms. Seelen?

MS. SEELEN: Yes, Your Honor.

THE COURT: You left another – either an exhibit or copy of an exhibit.

MS. SEELEN: Thank you, Your Honor.

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: Let the record reflect the jury has returned to the courtroom.

Ms. Seelen, you may proceed with the examination of Reverend Muncey-Neilson.

I should instruct the jury at this time that this testimony, or the testimony you are about to hear is admissible against the Conference only. It goes to the issue of notice, and you should not consider it against the Defendant Chambers.

[p. 160] DIRECT EXAMINATION (Continued)

BY MS. SEELEN:

Q State your name for the record?

A Janet Muncey-Neilson.

Q You need to lean forward so they can hear you.

Is that Reverend Muncey-Neilson?

A Yes.

Q And are you a minister in the United Methodist Church?

A Yes, I am.

Q And several months ago an investigator from our office contacted you to speak with you and you declined to do that, correct?

A Yes.

Q And prior to this trial, someone from my office again called you to speak with you and you telephoned Mr. Quigley, correct?

A Yes, I did.

Q And he told you it was your choice, correct?

A Yes.

Q And you decided not to do that?

A Yes, I did.

Q As a minister in the Rocky Mountain [p. 161] Conference of the United Methodist Church, am I correct that your supervisor is a District Superintendent?

A Yes.

Q And that the Rocky Mountain Conference of the Methodist church determines where you are placed?

A Yes, they do.

MS. SEELEN: Your Honor, at this time I would request to ask questions through leading questions.

THE COURT: All right. That leave will be granted.

Q (By Ms. Seelen) Reverend Muncey-Neilson, prior to – prior to – when were you hired by the Conference to go to the Grace United Methodist Church?

A That's a complicated question. I went to Grace United Methodist Church the 1st of July 1986.

Q Did the Conference place you there?

A Yes, they did.

Q Prior to going – to being placed at Grace United Methodist Church, did you express a concern to District Superintendent Jan Sumner?

A Yes, I did.

Q And that was in 1986?

A Yes, it was.

Q District superintendent Jan Sumner is a [p. 162] District Superintendent of Pueblo, correct?

A Yes, she is.

Q That's District Superintendent for the Rocky Mountain Conference, correct?

A Yes.

Q As a district superintendent for the Rocky Mountain Conference, is it fair to say Jan Sumner is the eyes and ears of the Bishop?

A Could you state that again, please?

Q Sure. Have you ever heard the expression the eyes and ears of the Bishop?

A I don't remember hearing it before.

Q It is fair to say that Jan Sumner was an agent of the Bishop?

A Yes.

Q In 1986, you met with Jan Sumner, the District Superintendent of Pueblo, and expressed a concern to her about Glen Chambers, correct?

A Yes, I did.

Q Tell the jury the concern that you expressed to her about Glenn Chambers.

A Over the period of about three weeks, on Sunday mornings Glenn had come into my office –

Q I'm directing you now to a time before you took the job, okay? Before you took the job you talked [p. 163] to Reverend Sumner, correct?

A Yes, over the phone.

Q Because you were concerned about taking the job?

A Yes.

Q What did you tell her about your concerns about taking the job?

A I was concerned because I had heard that Glenn was drinking.

Q And did you report that concern to her?

A Yes, I did.

Q And what was her response?

A I talked with her about that concern in relationship to having grown up in a family where there was a lot of drinking, and she said to me this may be a time to come to terms with that.

Q With your problems with alcoholics?

A Yes.

Q Did she seem surprised had Glenn Chambers – that you had heard that Glenn Chambers was an alcoholic?

A If she was, it wasn't apparent.

Q Did she tell you she had heard that before?

A No.

Q Between – this was early 1986 you had this [p. 164] conversation?

A It would have been in the late spring of 1986.

Q Between the late spring of 1986 and November of 1986, did you have any more convictions with Jan Sumner about concerns that you had regarding Glenn Chambers?

A Yes.

Q Prior to November 4, 1986, did you have any other conversations with her about Glenn Chambers?

A Not that I remember.

Q On November – after November 4, 1986, did you attend a clergywoman retreat?

A Yes, I did.

Q And at the clergywoman retreat, did you run into Reverend Jan Sumner?

A Yes, I did.

Q And she was still the District Superintendent of Pueblo?

A As far as I remember, yes.

MS. SEELEN: May I approach the witness, Your Honor?

THE COURT: Yes.

Q (By Ms. Seelen) And did you give her a copy of Plaintiff's Exhibit 22?

[p. 165] A Yes, I did.

Q Did you further discuss with her concerns that you had regarding Glenn Chambers?

A If I understand the question correctly, no.

Q Didn't you tell her that Glenn Chambers had come to you?

A I told her that Glenn had touched me.

Q Had touched you?

A Yes.

Q And you gave her a copy of Exhibit 22?

A Yes.

MS. SEELEN: Your Honor, at this time I move for the admission of Exhibit 22 and request that it be published to the jury.

THE COURT: Is there any objection?

MR. QUIGLEY: No.

MR. LOGAN: No.

THE COURT: Exhibit 22 is received.

Counsel, it's only a one-sentence statement. It might be something to just read it.

Q (By Ms. Seelen) Would you read it? It's dated November 4, 1986, correct?

A Yes.

Q November 4, 1986. Would you read what – what you wrote on that piece of paper.

---